

Am. B. 3040

(129)

Proceedings

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REPORTS

FROM

THE COURT OF CLAIMS,

SUBMITTED TO THE

HOUSE OF REPRESENTATIVES

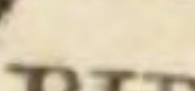
DURING

THE FIRST SESSION OF THE THIRTY-SIXTH CONGRESS,

1859-'60.

FIVE VOLUMES.

WASHINGTON:
THOMAS H. FORD, PRINTER.
1860.



BIBLIOTHECA
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TO THE

REPORTS OF THE COURT OF CLAIMS,

FIRST SESSION OF THE THIRTY-SIXTH CONGRESS.

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FINANCIAL STATEMENTS

Report of the Finance Committee of the House of Representatives
for the year ending June 30, 1890.

Presented to the House of Representatives
January 15, 1891.

REPORT

to the Honorable J. C. Calhoun, Chairman of the Finance Committee,
House of Representatives.

The Finance Committee of the House of Representatives,
organized on January 15, 1891,

FINANCIAL STATEMENTS OF THE UNITED STATES

- 1. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1890, is herewith submitted.
- 2. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1891, is herewith submitted.
- 3. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1892, is herewith submitted.
- 4. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1893, is herewith submitted.
- 5. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1894, is herewith submitted.

Respectfully,
Your obedient servant,

W. M. McKim,
Chairman of the Finance Committee,
House of Representatives.

DANIEL H. HUNTER,

Chief Clerk of the House.

Printed by the Government Printer.

The Finance Committee of the House of Representatives,
organized on January 15, 1891,
has the honor to acknowledge the receipt of the report of the Finance Committee of the House of Representatives for the year ending June 30, 1890, and to express its appreciation of the same. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1891, is herewith submitted. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1892, is herewith submitted. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1893, is herewith submitted. The report of the Finance Committee of the House of Representatives for the year ending June 30, 1894, is herewith submitted.

FERNANDO SAMANIEGO.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

FERNANDO SAMANIEGO *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Original documentary evidence in the case, transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said court, at Washington, this fifth day of December,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

FERNANDO SAMANIEGO *vs.* THE UNITED STATES.

To the honorable the judges of the Court of Claims:

The petition of Fernando Samaniego, of San Antonio, in the State of Texas, respectfully represents:

That in the month of April, A. D. 1855, W. W. Chapman, brevet major and assistant quartermaster in the army of the United States, by the direction of General Persifer F. Smith, made an offer to your petitioner to transport all the United States stores from Fort Clark to Fort Davis for one year at six cents per pound. The petitioner accepted the said offer so far as his own wagons were concerned, and agreed that if, after going to San Antonio and consulting his associates, they also accepted it, he would return to Corpus Christi and make a formal written contract. It was also agreed that while in San Antonio he was to send his train to Fort Clark, so as to arrive there about the 10th of May,

1855, which he did, and took a load to Fort Davis. Subsequently your petitioner returned from San Antonio to Corpus Christi, prepared to reduce the contract to writing, but the said Chapman declined to do so, on the ground that he had learned in the meantime that a contract had been made with other parties by order of the Secretary of War, but agreed that he would give the petitioner all the freight he could without interfering with the said contract with said parties.

On June 24, 1855, W. K. Van Bokkelen, captain and assistant quartermaster at Fort Clark, addressed a letter to Major and Assistant Quartermaster Chapman, at Corpus Christi, saying, "F. Samaniego is here with his train, and will leave for Fort Davis about the 10th of July, returning to this post 20th of August. He wishes to know if a load will be here at that time, if not, he will not return." To this letter Major Chapman, under date of July 10, 1855, replies: "Your letter of June 24, was duly received. Please inform F. Samaniego that there will be a load for his train at Fort Clark by the 20th of August." In pursuance of these instructions from Major Chapman, acting chief assistant quartermaster, department of Texas, Captain Van Bokkelen directed the petitioner to be at Fort Clark with his train by the 20th of August for a load to Fort Davis, Texas. Your petitioner reported with seventeen large wagons, with ten mules to each, on August 23, 1855, and awaited his loading until November 25, 1855, and on that day received the stores which had just arrived at Fort Clark from Corpus Christi. Your petitioner was thus delayed at Fort Clark for the period of three months and two days, whither he had gone under the directions of the quartermaster's department, with the positive assurance that he should have a load for his train on the 20th of August, and was during all said time ready and willing and waiting to transport the stores in pursuance of the agreement with the government. The damages and expenses to which your petitioner was subjected without any fault on his part, but by the acts and omissions of the officers of the United States to fulfil their engagements, are as follows, viz:

To wages of 24 men, at \$25 per month—3 months and two days.....	\$1,839 84
To subsistence for 24 men, at 25 cents per day.....	532 00
To forage for 180 mules and horses, 3 months and 2 days, at the rate of 12 lbs. corn each per day, at \$1 50 per bushel.	5,349 64
To wages of overseer at \$100 per month for 3 months and 2 days	306 66
To subsistence for ditto.....	23 00
To demurrage, at \$5 per day, for wagons and teams, 92 days.	7,820 00
	15,871 14

The petitioner is the sole owner of the claim, and has assigned no part of the same. Application for payment has been made of the proper departments of the government, but has been refused, not on the ground of any fault or omission of your petitioner, but from the default or omissions of the officers of the United States. No applica-

tion has been made to Congress. Your petitioner therefore respectfully asks that your honors will inquire into the foregoing matters, and grant him adequate relief in the premises.

F. SAMANIEGO.

UNITED STATES COURT OF CLAIMS.

F. SAMANIEGO *vs.* THE UNITED STATES.

List of papers filed on behalf of the petitioner.

- No. 1. Captain W. K. Van Bokkelen, report to Lieutenant Colonel A. C. Myers, dated May 2, 1856.
- No. 2. Same to Major W. W. Chapman, dated June 24, 1855.
- No. 3. Major Chapman to Captain Van Bokkelen, dated July 10, 1855.
- No. 4. Certificate of Captain Van Bokkelen, dated August 23, 1856.
- No. 5. Captain Van Bokkelen to Major Chapman, dated September 3, 1855.
- No. 6. Major Chapman to Lieutenant Colonel Myers, dated December 28, 1855.
- No. 7. Colonel Thomas to Major Chapman, dated January 25, 1856.
- No. 8. Same to Major Belger, dated January 25, 1856.
- No. 9. Major Chapman to General Jesup, dated February 9, 1856.
- No. 10. General Jesup to Major Chapman, dated February 27, 1856.
- No. 11. Lieutenant Colonel Myers to General Jesup, dated December 19, 1856.
- No. 12. General Jesup to Lieutenant Colonel Myers, dated January 7, 1857.
- No. 13. Same to R. J. Atkinson, Third Auditor, dated April 22, 1857.
- No. 14. Same to R. Burgess, dated January 22, 1857.
- No. 15. Account of F. Samaniego.
- No. 16. Report of Third Auditor and decision of Second Comptroller, dated May 6, 1857.

JOHN A. ROCKWELL,
Counsel for petitioner.

No. 1.

ASSISTANT QUARTERMASTER'S OFFICE,
Indianola, Texas, May 2, 1856.

COLONEL: Your letter of the 14th April has to-day reached me.

When passing through San Attonio the claim was spoken of to you and you stated that the commanding general would not recognize it. I therefore declined to give any information, unless called on for it from your office.

On the 24th June, 1855, I sent to Major W. W. Chapman, acting commissary and assistant quartermaster, a letter.

I received from Major W. W. Chapman, in answer, a letter dated July 10, 1855.

I nobedience to that letter I requested Lieutenant T. G. Pitcher, 8th infantry, regimental quartermaster at Fort Davis, to notify F. Samaniego to be at Fort Clark with his train. F. Samaniego reported to me with his train on the 22d August, and awaited at Fort Clark for a load to Fort Davis until 25th November, 1855.

I also addressed Major W. W. Chapman, acting commissary and assistant quartermaster, a letter under date September 3, 1855, and received a note in reply, stating that the roads were so wet that it was impossible to hire citizen transportation, or put government wagons on the road.

The first stores that arrived were given to Samaniego to haul.

Whilst at Fort Clark idle three citizens' trains were at San Antonio awaiting loads, and the only way that Samaniego could have obtained a load would have been to go to Corpus Christi for it; and the department were hauling by private teams at that time from Corpus, but wagons stuck in mud. He spoke to me on the subject, but I gave him no inducement, it not being my business.

I think, from the fact of other trains being idle and not able to obtain loading, justice would only allow F. Samaniego a claim for the hire of men and rations from August 22 to November 25, 1855, three months and three days.

I am, with respect, your obedient servant,

W. K. VAN BOKKELEN,
Captain, Assistant Quartermaster.

Lieutenant Colonel A. C. MYERS,
Chief Assistant Quartermaster, San Antonio.

A true copy.

A. C. MYERS,
Brevet Colonel, Assistant Quartermaster.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from a copy of the original on file in this office.

ROBERT J. ATKINSON, *Auditor.*

No. 2.

ASSISTANT QUARTERMASTER'S OFFICE,
Fort Clark, Texas, June 24, 1855.

MAJOR: F. Samaniego is here with his train, and will leave for Fort Davis about the 10th July, returning to this post 20th of August. He wishes to know if a load will be here at that time for him, if not, he will not return.

W. K. VAN BOKKELEN,
Captain, Assistant Quartermaster.

Major W. W. CHAPMAN,
Acting Chief Assistant Quartermaster, Corpus Christi.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 3.

[Extract.]

ASSISTANT QUARTERMASTER'S OFFICE,
Corpus Christi, Texas, July 10, 1855.

CAPTAIN: Your letter of June 24th was duly received. Please inform F. Samaniego that there will be a load for his train at Fort Clark by the 20th of August.

* * * * *

W. W. CHAPMAN,

Acting Chief Assistant Quartermaster, Department of Texas.

Captain W. K. BOKKELEN,

Assistant Quartermaster, Fort Clark, Texas.

A true copy.

W. K. VAN BOKKELEN,
Captain, Assistant Quartermaster.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 4.

ASSISTANT QUARTERMASTER'S OFFICE,
Indianola, Texas, August 23, 1856.

SIR: I certify that you reported to me with a train of (17) seventeen wagons, on the 2^d August, 1855, and waited for loads until November 25, 1855, at Fort Clark, Texas.

W. K. VAN BOKKEMEN,
Captain, Assistant Quartermaster.

F. SAMANIEGO.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 5.

[Extract.]

ASSISTANT QUARTERMASTER'S OFFICE,
Fort Clark, Texas, September 3, 1855.

MAJOR: In your letter of July 10, you say: "Please inform F. Samaniego that there will be a load for his train at Fort Clark by the 20th August." I accordingly did so and the train arrived here on the 22d, and nothing has been heard of any stores coming forward for his train.

* * * * *

W. K. VAN BOKKELEN,
Captain, Assistant Quartermaster.

Major W. W. CHAPMAN,
Acting Chief Assistant Quartermaster, Corpus Christi.

A true copy.

W. K. VAN BOKKELEN,
Captain, Assistant Quartermaster.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

ASSISTANT QUARTERMASTER'S OFFICE,
Indianola, Texas, October 1, 1856.

I certify that under instructions from Major W. W. Chapman, acting chief assistant quartermaster, department of Texas, dated July 10, 1855, I directed F. Samaniego to be at Fort Clark with his train by the 20th August, 1855, for load to Fort Davis, Texas.

He reported with seventeen large wagons on the 23d August, 1855, and awaited his loading until the 25th November, 1855; on that day he received the stores just received at Fort Clark from Corpus Christi, intended to be at Fort Clark by the 20th August, but delayed from bad weather and roads.

The terms of hauling were agreed on at the chief quartermaster's office, Corpus Christi, Texas.

W. K. VAN BOKKELEN,
Captain, Assistant Quartermaster.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 6.

ASSISTANT QUARTERMASTER'S OFFICE,
Corpus Christi, Texas, December 28, 1855.

COLONEL: I enclose you a letter from Mr. F. Samaniego, (a Mexican gentleman,) which I hope will meet with your very favorable consideration. By direction of the general, I have made a verbal contract with Mr. Samaniego to haul all our supplies for one year from Fort Clark to Fort Davis. When we heard of the Giddings and Jefferson contract, Mr. Samaniego let me off from the contract, and I promised him, with the approval of the general, to give him all the hauling I could. He came down to Fort Clark at my request, but it seems there were no stores there for him, and he has waited three months. He might be satisfied if you would give him a few trips from Fort Clark to Fort Davis.

W. W. CHAPMAN,
Assistant Quartermaster.

Lieutenant Colonel A. C. MYERS,
Chief Assistant Quartermaster, San Antonio.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I certify that the foregoing is truly copied from a copy of a copy on file in this office.

ROBT. J. ATKINSON, Auditor.

No. 7.

QUARTERMASTER GENERAL'S OFFICE,
Washington City, January 25, 1856.

In a letter of Captain Van Bokkelen to Brevet Major Belger, dated the 2d instant, he states that he was instructed by you that you had made a contract with F. Samaniego to transport all supplies from the depot at Fort Clark to Fort Davis; that he would reserve all loading for said person. This contract has never been received, and you are instructed to send it without delay. It is presumed that it was, as all such contracts should be, made in writing; and the law requires all contracts made to be reported in the Second Comptroller's office within ninety days, and also that annual reports of them be submitted to Congress at each session. It is also feared that this contract may conflict with the rights of Giddings & Co., under their contract.

By order:

CHAS. THOMAS,
Deputy Quartermaster General.

Major W. W. CHAPMAN,
Assistant Quartermaster, Corpus Christi, Texas.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from a copy of the original on file in this office.

ROBT. J. ATKINSON, Auditor.

No. 8.

QUARTERMASTER GENERAL'S OFFICE,
Washington, January 25, 1856.

Your letter, dated the 6th instant, enclosing a copy of one addressed to you by Captain Van Bokkelen, in relation to contracts for transportation of supplies in Texas, is received.

When contracts are entered into by the authorized agents of the department they should be carried into effect by all parties concerned; consequently, you should have notified the officers at the different points embraced in Giddings & Co.'s contract of its existence, without waiting for instructions from Major Chapman; it was not necessary to ask him whether it was "expected" of you to do so, and especially as you did not receive any reply from him.

The contract with F. Samaniego, mentioned in Captain Van Bokkelen's letter, has not reached this office.

By order:

CHARLES THOMAS,
Deputy Quartermaster General.

Major JAMES BELGER,
Assistant Quartermaster, San Antonio, Texas.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from a copy of the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 9.

ASSISTANT QUARTERMASTER'S OFFICE,
Corpus Christi, Texas, February 9, 1856.

GENERAL: I had the honor to receive this morning your letter of the 25th ult., and, in reply, would respectfully state that sometime in April last I made an offer to Mr. Samaniego, by direction of General Smith, to transport all our stores from Fort Clark to Fort Davis for one year, at six cents per pound. He accepted the offer so far as his own wagons were concerned, and said that if, after going to San Antonio and consulting his associates, they also accepted it, he would return to this place and make a formal written contract; and while at San Antonio he was to send his train to Fort Clark, so as to arrive there about the 10th May, which he did, and it took a load to Fort Davis. He returned from San Antonio to this place prepared to make the contract in writing; but, in the meantime, I received information of the contract made with Giddings & Co., and told Mr. Samaniego, frankly, how I was situated; also that I presumed the contract with those parties could not go into immediate effect, and that if he would relieve me from the verbal arrangement made with him, that I would give him all the freight I could without interfering with the contract of Giddings & Co. This he con-

sented to do. I told him that on the return of his train to Fort Clark from Fort Davis, there would probably be loading there for him, but it seems there was not, and his train remained there some months waiting for a load. He addressed me a letter on the subject, which I referred to Colonel Myers, with a letter of my own, of which the enclosed is a copy. All my letters to Captain Van Bokkelen on this subject are in the letter-book of the chief assistant quartermaster at San Antonio, but, as near as I remember, they amount to instructions to give Mr. Samaniego loading if possible.

My course in this transaction met with the approval of General Smith, to whom I respectfully refer you, if the above is not entirely satisfactory.

W. W. CHAPMAN,
Brevet Major and Assistant Quartermaster.

Major General THOMAS S. JESUP,
Quartermaster General, United States Army, Washington.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from a copy of the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 10.

QUARTERMASTER GENERAL'S OFFICE,
Washington City, February 27, 1856.

I have received your letter dated the 9th instant, which is entirely unsatisfactory. You have violated the law in not sending the contract to this office to be deposited in the treasury. You had no right to make a verbal contract; and if you, from the necessities of the service, were compelled to employ any one for a single trip, or for more than one trip, it was your duty to include him and his means of transportation in your monthly reports.

In this case, it now appears that a verbal contract, illegally made, has been going on for a whole year without any notice having been given of it to this office, and that as late as the 28th of December last you had continued this illegal contract. Now, sir, there must be an end to all measures so objectionable.

THOMAS S. JESUP,
Quartermaster General.

Major W. W. CHAPMAN,
Assistant Quartermaster, Corpus Christi, Texas.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from a copy of the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 11.

OFFICE OF ASSISTANT QUARTERMASTER,
Department of Texas, San Antonio, December 19, 1856.

SIR: I enclose herewith a claim of Fernando Samaniego for demurrage with a train of seventeen ten-mule wagons at Fort Clark, Texas; letters from Major W. W. Chapman, assistant quartermaster, and Captain Van Bokkelen, assistant quartermaster, accompanying the claim on the basis on which it is founded. Without regard to the several items in the account, which make up the sum charged, it appears just that a daily sum for each wagon should be allowed as demurrage while awaiting at Fort Clark the orders of officers in the quartermaster's department to load with and transport public supplies. It will be perceived that the certificates of Captain Van Bokkelen, giving the dates at which the wagons were reported to him, vary one day; but the extreme date, nevertheless, that the wagons were detained at Fort Clark make one day more, taking from 23d of August to 25th November, than is charged in the account herewith. The item charged for forage and issue of twelve pounds a day to each mule ought not to be admitted; the price paid for corn at Fort Clark by the quartermaster's department, at the time the citizens' train was there, was \$1 10 and \$1 20 per bushel. The issue of twelve pounds of corn to each mule can scarcely be the custom of citizens in feeding their animals, particularly at the season of the year when grass is abundant. My orders to officers in the department are not to feed grain to the public animals when grass is good and they are not at work. It would seem equitable, in reference to the charge for forage, to believe that the transporters, in 'daily expectation of being called on to load their wagons and to start on any trip, would endeavor to have their animals in strength and condition to do their work, and, with such view, feed some grain daily to them, say four or five pounds for each animal.

A. C. MYERS,

Brevet Colonel, Assistant Quartermaster.

Major General THOMAS S. JESUP,

Quartermaster General, Washington.

TREASURY DEPARTMENT,

Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from a copy of the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 12.

QUARTERMASTER GENERAL'S OFFICE,

Washington City, January 7, 1857.

I have received your letter of the 19th of last month, enclosing the claim of Fernando Samaniego for the detention of ten mule wagons at Fort Clark for 92 days. Mr. Samaniego may have a just claim against Major Chapman, but he has no just claim against the public.

Every man is supposed to understand the laws of the country, and if he disregards them he acts in his own wrong, and the government is not responsible for his neglect. Major Chapman had no legal right to make a verbal contract with any one. The law requires all contracts to be deposited in the Second Comptroller's office within ninety days after their date. No such contract as that referred to has been forwarded. Nor is there any such contract on file in the Comptroller's office. An officer may start a single train, and the bill of lading will be a valid engagement for that transaction; but for successive trains, or for labor to be performed beyond the immediate time when the engagement is made, a written contract is necessary; and that, too, after public notice inviting competition. Major Belger informed Major Chapman of the contract with Giddings and Jefferson, made by authority of the Secretary of War as early as May, 1855, and although there was no legal contract with Samaniego, the major directed Captain Van Bokelen to detain his train, when to do so was in violation of a contract legally made with Giddings and Jefferson. The transaction can never be recognized here. Major Chapman having acted in the matter without authority, and in violation of law, is legally responsible for any damage Mr. Samaniego may have sustained—not the sum he claims, but the actual cost of the detention. I will retain the papers subject to your orders.

THOS. S. JESUP,
Quartermaster General.

Lieutenant Colonel A. C. MYERS,
Principal Assistant Quartermaster, San Antonio, Texas.

TREASURY DEPARTMENT,
Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from a copy of the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 13.

QUARTERMASTER GENERAL'S OFFICE,
Washington City, April 22, 1857.

SIR: In compliance with the request expressed in your letter of the 15th instant, I enclose a copy of a letter from Lieutenant Colonel A. C. Myers, dated the 19th December, 1856, submitting a claim of Fernando Samaniego for the detention of a train of wagons and mules at Fort Clark from the 22d of August to the 24th of November, 1855, and believing that to a full understanding of the case other papers were necessary, I have added copies of papers on the subject, numbered from 1 to 7, and from 9 to 13, the contents of which are indicated on the accompanying list, marked A. Considering the whole transaction wrong, I have never recognized it, and being for damages, I consider it a case with which the Treasury Department has properly nothing to do. It is a case which Congress alone has a right to decide. A

contract to be legal must be in writing, and the original must be deposited within ninety days in the office of the Second Comptroller; this was not done, but the contract, as it is called, is said to have been verbal. If that was so, the person employed with his train should have been reported on the monthly reports. No monthly report received at this office from Major Chapman contains the slightest allusion to Mr. Samaniego as employed by the department. Never having recognized the claim, I have not included it in any estimate, and there is consequently no money which can be legally applied to the payment of it.

I have the honor to be, sir, your obedient servant,

THOS. S. JESUP,

Quartermaster General.

R. J. ATKINSON, Esq.,

Third Auditor, Treasury Department.

TREASURY DEPARTMENT,

Third Auditor's Office, June 22, 1858.

I hereby certify that the foregoing is truly copied from the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 14.

QUARTERMASTER GENERAL'S OFFICE,

Washington, January 23, 1857.

SIR: Your letter dated yesterday, enclosing a power of attorney from Mr. F. Samaniego, in relation to a claim sometime since referred to this office by Lieutenant Colonel A. C. Myers, and requesting that all the papers in the case be transmitted to you, with such reasons for its rejection as the quartermaster general may think proper to communicate to you, is received, and I herewith enclose the original claim as received from Lieutenant Colonel Myers, with the letters received from him with the claim—seven papers in all. The transaction has not been recognized in this office as legal or binding, inasmuch as no contract or agreement was made by the officer under whose directions it appears to have originated.

I return the power of attorney agreeably to your request.

By order:

CHAS. THOMAS,

Assistant Quartermaster General.

RICHARD BURGESS, Esq.,

Washington City, D. C.

TREASURY DEPARTMENT,

Third Auditor's Office, June 24, 1858.

I hereby certify that the foregoing is truly copied from the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 15.

The United States to Fernando Samaniego, Dr.

To expenses and damages incurred by detention of trains of seventeen wagons, of ten mules each, at Fort Clark, Texas, from — to — as follows, to wit:

To wages of 24 men, at \$25 per month each, three months and two days.....	\$1,839 84
To subsistence for 24 men, at 25 cents per day.....	532 00
To forage for 180 mules and horses, three months and two days, at the rate of 12 pounds corn each per day, at \$1 50 per bushel.....	5,349 64
To wages of overseer, at \$100 per month, for three months and two days.....	306 66
To subsistence of overseer, for three months and two days	23 00
To demurrage, at \$5 per day, for wagons and teams, 92 days.....	7,820 00
Sum total.....	<u>15,871 14</u>

STATE OF TEXAS, *County of Bexar*:

Before me, the undersigned authority, an acting justice of the peace in and for the said county, personally appeared Fernando Samaniego, to me known, and to whose credibility I hereby certify, who, after being first duly sworn, upon his oath, says: That the foregoing account of fifteen thousand eight hundred and seventy-one dollars and fourteen cents, (\$15,871 14,) in his favor and against the United States, is just, true, and correct; that the items charged as expenses incurred during the said detention are correctly stated, and the amounts charged therefor are the actual sums expended during and by reason of said detention; and that the item charged for demurrage is not only just and reasonable, but actually less than one-third of the receipts and revenue derived from said wagons and teams when in service under my contract with said government.

FERNANDO SAMANIEGO.

Sworn to and subscribed before me this 15th day of November, 1856.

JAS. E. GARDNER, *J. P. B. C.*STATE OF TEXAS, *County of Bexar*:

I, Samuel S. Smith, clerk of the county court of said county, do hereby certify that Jas. E. Gardner, esq., before whom the foregoing affidavit was made, and whose genuine signature is thereunto subscribed, was at the date of so doing a justice of the peace in and for said county, duly commissioned and sworn, and that said county court is a court of record.

In testimony whereof, I have hereunto signed my name and affixed
 [L. s.] the seal of said county, at office in San Antonio, this 15th
 day of November, A. D. 1856.

SAM. S. SMITH,
Clerk of County Court, Bexar County,
 By EDWARD MILES, *Deputy.*

STATE OF TEXAS, *County of Bexar:*

Before me, the undersigned authority, an acting justice of the peace in and for said county, personally appeared Geo. T. Howard, to me well known, and to whose credibility I hereby certify, who, after being first duly sworn, upon his oath says: That the last item in the account hereto attached, to wit: demurrage at \$5 per day, is a fair and just charge, it being only about one-third of the amount that each wagon and team makes per day under such contracts.

GEO. T. HOWARD.

Sworn to and subscribed before me this 19th day of November,
 A. D. 1856.

C. E. JEFFERSON, *J. P. B. C.*

STATE OF TEXAS, *County of Bexar:*

I, Sam. S. Smith, clerk of the county court of said county, do hereby certify that C. E. Jefferson, esq., before whom the foregoing affidavit was made, and whose genuine signature is thereunto subscribed, was at the date of so doing a justice of the peace in and for said county and State, duly commissioned and sworn, and that said county court is a court of record.

In testimony whereof, I have hereunto signed my name and affixed
 [L. s.] the seal of said county court, at office in San Antonio, this
 19th day of November, A. D. 1856.

SAM'L S. SMITH,
Clerk of County Court, Bexar County.

STATE OF TEXAS, *County of Bexar.*

Before me, the undersigned authority, an acting justice of the peace within and for the county of Bexar and State aforesaid, personally appeared A. Daguerre, to me well known, and to whose credibility I hereby certify, who, after being duly sworn, upon his oath says: That he has examined the foregoing and annexed account, in favor of Fernando Samaniego and against the United States government, and believes the same to be just, true, and correct. That he knows and is well acquainted with said Samaniego, and knows that he was engaged in transporting government stores with his wagon trains from Fort Clark to Fort Davis, Texas; that each of his wagons will carry and do carry 5,000 pounds of freight each; and that his said train consists of seventeen wagons, with teams to correspond, say ten mules to each team; and that the trip from the fort to the fort aforesaid can be, and usually is, made by said train in eighteen days.

And further, that affiant has seen and examined the contract of said Samaniego with the said government, and knows the contract

price for hauling the stores aforesaid to and from the forts aforesaid to be six (6) cents per pound.

A. DAGUERRE.

Sworn to and subscribed before me this 15th day of November, A. D. 1856.

JAS. E. GARDNER, *J. P. B. C.*

STATE OF TEXAS, *County of Bexar:*

I, Sam. S. Smith, clerk of the county court of said county, do hereby certify that Jas. E. Gardner, esq., before whom the foregoing affidavit was made, and whose genuine signature is thereunto subscribed, was at the time of signing the same a justice of the peace in and for the county and State aforesaid, duly commissioned, qualified, and sworn, and that said county court is a court of record.

To certify to which, I have hereunto signed my name and affixed
[L. S.] the seal of the county court of said county, at office in San Antonio, this 15th day of November, A. D. 1856.

SAM. S. SMITH,

Clerk of County Court, Bexar County,
By EDWARD MILES, *Deputy.*

TREASURY DEPARTMENT,

Third Auditor's Office, June 23, 1858.

I hereby certify that the foregoing is truly copied from the original on file in this office.

ROBT. J. ATKINSON, *Auditor.*

No. 16.

Report of the Third Auditor of the Treasury on the claim of Fernando Samaniego for expenses and damages alleged to have been incurred by the detention of a train, consisting of seventeen wagons, of ten mules each, while waiting at Fort Clark, Texas, for a load of public stores for Fort Davis, between August 23 and November 25, 1855, three months and two days, amounting to \$15,871 14.

Received March 21, 1857, from Richard Burgess, esq.

The claim consists of the following items, viz:

To wages of 24 men, at \$25 per month each, three months and two days	-	-	-	-	-	\$1,839 84
Subsistence for 24 men, at 25 cents per day	-	-	-	-	-	532 00
Forage for 180 mules and horses, 3 months and 2 days, at the rate of 12 pounds corn each per day, at \$1 50 per bushel	-	-	-	-	-	5,349 64
Wages of overseer, at \$100 per month, for three months and two days	-	-	-	-	-	306 66
Subsistence for overseer for three months and two days	-	-	-	-	-	23 00
Demurrage at \$5 per day for wagons and teams, 92 days	-	-	-	-	-	7,820 00
Sum total	-	-	-	-	-	<u>15,871 14</u>

The claimant makes oath to the correctness of the several items ; and affidavits by George T. Howard and A. Daguerre, whose credibility is certified to, are also filed in support of the claim. Also the following certificate :

ASSISTANT QUARTERMASTER'S OFFICE,
Indianola, Texas, October 1, 1856.

I certify that under instructions from Major W. W. Chapman, acting chief assistant quartermaster, department of Texas, dated July 10, 1855, I directed F. Samaniego to be at Fort Clark with his train by the 20th August, 1855, for loads to Fort Davis, Texas. He reported with 17 large wagons, and awaited his loading until 25th November, 1855. On that day he received the stores just received at Fort Clark from Corpus Christi, intended to be at Fort Clark by the 20th August, but delayed from bad weather and roads. The terms of hauling were agreed on at the chief quartermaster's office, Corpus Christi, Texas.

W. H. VAN BOKKELEN,
Captain, Assistant Quartermaster.

The papers relating to the claim were forwarded by Colonel A. C. Myers to the quartermaster general, who enclosed them to the attorney, Mr. Burgess, with the remark that "the transaction has not been recognized in this office" (the quartermaster general's) "as legal or binding, inasmuch as no contract or agreement was made by the officer under whose directions it appears to have originated." It appears that the claimant had been engaged with his train in hauling for the quartermaster's department, from Fort Clark to Fort Davis, prior to the time when this claim arose ; but concerning the arrangement or agreement under which he rendered such services, nothing is known except, that the terms of hauling were agreed on at the chief quartermaster's office at Corpus Christi, as stated by Captain Van Bokkelen in the foregoing certificate, and that the rate was six cents per pound, as shown by the vouchers for the payments.

To go no further back, on the 17th of May, 1855, he received at Fort Clark, for transportation, 55,528 pounds of public stores, which were delivered at Fort Davis on the 7th of June following ; and on the 14th of July he received another load at Fort Clark, consisting of 59,534 pounds, which was delivered at Fort Davis on the 7th August, 1855. For the hauling of these loads he was paid at six cents per pound, \$3,331 68 for the first, and \$3,572 04 for the second, making an aggregate of \$6,903 72 for the two loads. These facts are learned from the accounts of Captain Van Bokkelen and Lieutenant F. G. Pitcher ; those which follow are derived from the papers herewith. On the 24th of June, 1855, and after the delivery of the first of the above-mentioned stores, Captain Van Bokkelen wrote to Major W. W. Chapman, at Corpus Christi, stating that Mr. Samaniego was then at Fort Clark with his train, and would start with a load for Fort Davis about the 10th of July, returning to that post (Fort Clark) about the 20th of August, and wished to know if a load would be there at that time for him, and if not, he would not return. In reply, July 10,

Major Chapman requested Captain Van Bokkelen to inform Mr. S. that there would be a load for his train at Fort Clark by the 20th August, and being notified accordingly, the claimant, after having delivered the before-mentioned load at Fort Davis on the 9th of August, returned with his train to Fort Clark on the 23d of August. The stores which were to furnish the loading, however, had not been forwarded from Corpus Christi, and their arrival was awaited by the train. On the 3d of September Captain Van Bokkelen wrote to Major Chapman, who stated, in reply, that "the roads were so wet that it was impossible to hire citizen transportation or put government wagons on the road." It seems that under these circumstances the claimant thought of going to Corpus Christi for the stores, and that he mentioned the subject to Captain Van Bokkelen, who states that he gave him no inducement to go, it not being his business. He continued at Fort Clark until the 25th of November, about three months and two days from the date of his arrival there, when a load for his train was obtained, the first stores that were received being given to him to haul.

The papers furnish no evidence that after the claimant's arrival at Fort Clark with his wagons and teams any inducement was held out to him to wait for the stores, other than the pecuniary benefit which by so doing he would be enabled to derive from their transportation. That he did remain is established beyond doubt, however, and the only difficulty is in determining whether, under the circumstances, he is entitled to indemnity, and if yea, whether he can receive it through the accounting officers of the treasury. If the claim be considered as *for damages*, it is well settled that relief can only be granted by Congress. The Quartermaster General considers it a case of this kind, and reports against it on that ground. It is true he takes other exceptions to the claim, but whether they be well founded or not is not material if it be considered as a claim for "damages." It is suggested by Mr. Burgess, the attorney, that it is a claim for *demurrage*, growing out of an undue detention of the teams, wagons, &c., belonging to Samaniego; but in my opinion that will depend upon whether or not there was a valid contract. Claims for demurrage cannot properly accrue except there be a contract on which to predicate it. It is admitted that no written contract was made for the transportation of any specific stores, or at any specific time, but it is alleged that there was some "verbal contract," the terms of which are not made known. There is nothing which indicates that Mr. Samaniego was under any obligation to remain in waiting for the stores, or that a failure on his part so to remain would have involved him in any liability to the government in consequence thereof. Upon such a state of facts it is hardly to be considered as a contract, whether verbal or written, such as would be necessary in order to base a claim for demurrage. A contract implies mutuality of obligation. But even if there were a contract, verbal or written, the claim as set up might well be considered in the nature of *damages*. Such claims arise from breaches of contracts more frequently perhaps than from any other source. And in all such cases, as before remarked, the accounting officers take no jurisdiction. I do not consider it necessary

to consider the merits of the claim further in the present report, but transmit the papers herewith, with these remarks for your consideration, in connexion with the legal questions involved, as preliminary to any further investigation.

ROBERT J. ATKINSON, *Auditor*.

JOHN M. BRODHEAD, Esq.,
Second Comptroller of the Treasury.

TREASURY DEPARTMENT,
Third Auditor's Office, May 1, 1857.

Decision of Second Comptroller.

I have examined with much care all the documents in this case. The whole proceedings are of an irregular and slipshod character, properly rebuked by the Quartermaster General, and this cannot, I think, be considered of the dignity of a contract binding upon the United States, as most of it appears to me that all that can be gathered from the correspondence and indefinite verbal understanding (which always end in misunderstandings) is, that Mr. Samaniego would be employed when loading could be furnished at Fort Clark, and that Major Chapman expected that he would have a load at that place for the train by the 20th August, instead of the 25th of November, 1855. In fact, Major Chapman, in his letter to the Quartermaster General, dated February 9, 1856, says, in reference to his letter to Capt. Van Bokkelen, that as near as I remember they amount to "instructions to give Mr. Samaniego loading if possible." And he states in substance, in a previous part of the same letter, that he had promised this conditional freight because he could not enter into the formal written contract, which, it seems, both parties had contemplated, but the making of which was frustrated by the contract with Giddings & Co. But the point made by the Auditor is unanswerable: every contract is founded upon *mutual* agreement of parties, carrying with it reciprocal liabilities, and, as the Auditor well observes, implies mutuality of obligation. It will not be pretended that Mr. Samaniego would have been liable for damages to the United States if his train had not appeared at all at Fort Clark in August, 1855, or if, after it reached there, it had left without waiting an hour for loading to arrive.

The claim is one of demurrage, even if the term be applicable in cases of transportation by land cannot be sustained. To be valid it must be founded on *express* agreement. Demurrage, properly so called, arises out of the terms of a contract between a ship-owner and a freighter, or from a stipulation in the bill of lading, and the master of a ship who undertakes by a bill of lading to deliver goods to the consignee on payment of freight cannot maintain an action against the latter for an *implied* contract to pay demurrage. There must be an *express* stipulation to that effect to create a legal liability to pay demurrage, though if a ship be improperly detained by the freighter or consignee, the owner may have a special action for the *damages* resulting from such detention.

That Mr. Samaniego suffered a very considerable loss by the delay his train experienced is undoubtedly true; but if he has a just claim against the United States for the detention, it must unquestionably be in the nature of damages, and therefore not be adjudicated by the accounting officers. Congress alone can afford him relief. Nor do I think that the executive officers of the government should recognize, no further than they are legally bound to do, such vague and careless transactions on the part of disbursing officers, giving rise inevitably to questions of much embarrassment and involving a probable waste of the public money.

J. M. BRODHEAD, *Comptroller*.

MAY 6, 1857.

TREASURY DEPARTMENT,
Third Auditor's Office, June 23, 1858.

I hereby certify that the foregoing is truly copied from the original on file in my office.

ROBT. J. ATKINSON, *Auditor*.

IN THE COURT OF CLAIMS.

FERNANDO SAMANIEGO *vs.* THE UNITED STATES.

Petitioner's brief.

This claim is based solely upon the engagement entered into by Captain and Assistant Quartermaster Bokkelen and Major and Assistant Quartermaster W. W. Chapman, as shown by their correspondence.

A verbal contract had been made by Major Chapman with the petitioner for one year by the order of General Persifor F. Smith, but Major Chapman, instead of fulfilling that contract, or even reducing it to writing, found that he had made some mistake in relation to it, and requested to be released from that contract; to which, as it is stated, the petitioner assented. However this may be, the present claim is not based upon that contract for a year's service, and all the reports of the Auditor, Comptroller, Quartermaster General, &c., in relation to that contract, have no bearing upon the claim of the petitioner.

There was a contract made for a specified service by officers authorized to make it, and that contract has been violated.

1. Was there a contract made?

That there was one is shown by the following correspondence, (pp. 6 and 7 of Record:)

“ ASSISTANT QUARTERMASTER'S OFFICE,
Fort Clark, Texas, June 24, 1855.

“ MAJOR: F. Samaniego is here with his train, and will leave for Fort Davis about the 10th July, returning to this post 20th August.

He wishes to know if a load will be here at that time for him ; if not, he will not return.

“W. K. VAN BOKKELEN, *Capt. A. Q. M.*

“Major W. W. CHAPMAN,
“*Actg. C. A. Q. M., Corpus Christi.*”

“ASSISTANT QUARTERMASTER'S OFFICE,
“*Corpus Christi, Texas, July 10, 1855.*

“CAPTAIN: (Extract.) Your letter of June 24 was duly received. Please inform F. Samaniego that there will be a load for his train at Fort Clark by the 20th of August.

* * * * *

“W. W. CHAPMAN,

“*Act. Chief A. Q. M., Department of Texas.*

“Captain W. K. VAN BOKKELEN,
“*A. Q. M., Fort Clark, Texas.*”

“ASSISTANT QUARTERMASTER'S OFFICE,
“*Indianola, Texas, August 23, 1856.*

“SIR: I certify that you reported to me with a train of (17) seventeen wagons on the 22d August, 1855, and waited for loads until November 25, 1855, at Fort Clark, Texas.

“W. K. VAN BOKKELEN,
“*Capt. A. Q. M.*

“F. SAMANIEGO.”

“ASSISTANT QUARTERMASTER'S OFFICE,
“*Fort Clark, Texas, September 3, 1855.*

“MAJOR: (Extract.) In your letter of July 10th you say: ‘Please inform F. Samaniego that there will be a load for his train at Fort Clark by the 20th of August.’ I accordingly did so, and the train arrived here on the 22d, and nothing has been heard of any stores coming forward for his train.

“W. K. VAN BOKKELEN,
“*Capt. A. Q. M.*

“Major W. W. CHAPMAN,
“*Actg. Chief A. Q. M., Corpus Christi.*”

“ASSISTANT QUARTERMASTER'S OFFICE,
“*Indianola, Texas, October 1, 1856.*

“I certify that, under instructions from Major W. W. Chapman, acting chief assistant quartermaster, department of Texas, dated July 10, 1855, I directed F. Samaniego to be at Fort Clark with his train by the 20th August, 1855, for load to Fort Davis, Texas.

“He reported with 17 large wagons on the 23d August, 1855, and awaited his loading until 25th November, 1855. On that day he received the stores just received at Fort Clark from Corpus Christi, intended to be at Fort Clark by the 20th August, but delayed from bad weather and roads.

“The terms of hauling were agreed on at the chief quartermaster’s office, Corpus Christi, Texas.

“W. K. VAN BOKKELEN, *Capt. A. Q. M.*”

It thus appears that this contract was not a “verbal contract,” but a *written* one. The letter of Captain Bokkelen states that Samaniego wishes to know if a load will be at Fort Clark for him on the 20th August. Major Chapman replied, and requests Captain Bokkelen to inform Samaniego “that there will be a load for his train at Fort Clark by the 20th of August.”

Capt. Bokkelen, in his letter to Major Chapman of the 3d September, says: “In your letter of July 10 you say, ‘please inform F. Samaniego that there will be a load for his train at Fort Clark by the 20th of August.’ I accordingly did so, and the train arrived here on the 22d, and nothing has been heard of any stores coming forward for his train.”

In addition to this, Captain Bokkelen certifies on the 1st October, 1856, that Samaniego “reported with 17 large wagons on the 23d August, 1855, and awaited his loading until the 25th November, 1855.”

If, therefore, the government could either *legally* or *honestly* escape the obligations arising from these acts of its officers on the ground that they are not bound by *verbal* contracts, (which is not admitted,) this ground would fail them in this case, because the contract here was in writing. The statutes of frauds, which require certain contracts with individuals to be in writing, would, according to the well-settled rules of law, be fully satisfied by a contract in the manner shown in this case.

This was a *positive* and *unconditional* engagement.

Major Chapman directed Captain Van Bokkelen to inform Samaniego that “*there will be a load for his train at Fort Clark by the 20th of August,*” and he does so inform him, and he comes with his seventeen teams at the time to fulfil the service agreed upon.

Major Chapman, in his letter of 9th February, 1856, to General Jesup, (Rec., p. 10,) is *mistaken* when he says, “I told him that on the return of his train from Fort Clark, Davis then would *probably* be loading there for him.” The letters written show precisely what he did say, and it amounted, in substance, not only to a positive statement that there *would be*, but an *engagement* that there *should be*, a load for his team.

The Second Comptroller is equally mistaken on this subject. He says, (Rec., p. 29 :) “In fact, Major Chapman, in his letter to the Quartermaster General, dated February 9, 1856, says, in reference to his letter to Captain Van Bokkelen, that, or near as I remember, they amount to “instructions to give Mr. Samaniego loadings if possible ;” and he states, in substance, in a previous part of the same letter, that he had promised this *conditional* freight, &c.

Now, in the first place, the Comptroller affects to give, *as near as he remembered*, the language of Major Chapman, and then substitutes Major Chapman’s erroneous comments upon the letters evidencing the contract, when he must have had the very letters before him, which spoke for themselves, and showed both statements to be erroneous.

2. The contract entered into by Major Chapman was clearly and manifestly within his authority, not only from the nature of the duties assigned to him and the character of the services to be performed, but from the express provisions of the law, and the army regulations.— (See Brightly's Digest, pp. 64, 67, and army regulations, as to duties of this department.)

It is intrusted to the officers of that department "to purchase military stores, camp equipage, and other articles requisite for the troops, and generally to procure and provide means of transport for the army, its stores, artillery, and camp equipage." (P. 64.) They are required to give bonds for the faithful discharge of their duties. (P. 65.)

The transactions of this department are those which arise from day to day, and the officer of the quartermaster's department has necessarily intrusted to him the discharge of these daily duties. When he makes a contract for the transportation of military stores for the army in the field or for a military station hundreds or thousands of miles from Washington, must he wait for the approval by the head of the department at Washington, and is such contract void unless so approved? Cannot such an officer, with prudent forethought, engage such transportation in advance; and if it so happens that he cannot fulfil his engagement, is it void, and must the innocent person who has made the contract suffer? Such principles in relation to officers charged with such duties would be neither sensible nor just.

But the Quartermaster General says, (Rec., p. 137 :) "A contract to be legal must be in writing, and the original must be deposited within ninety days in the office of the Second Comptroller." Again, (Rec., p. 129,) "The law requires all contracts to be deposited in the Second Comptroller's office within ninety days after their date. No such contract as that referred to has been forwarded, nor is there any such contract on file in the Comptroller's office."

It is supposed that the law referred to is found in the 6th section of the act of Congress of July 16, 1798, (1 Stat., 610,) which is—

"That all contracts to be made by virtue of this or of any law of the United States, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited in the office of the Comptroller of the Treasury within ninety days after their dates, respectively."

1st. The first answer to this is, that it does not, and from the nature of the case cannot, by possibility, apply to the contracts made from day to day by an officer in the quartermaster's department on a distant service. His duty is to buy provisions for the supply of the army. Must his contract for these provisions be forwarded to Washington, and be approved by the department here, and deposited in the Comptroller's office, before it is valid; and must the alternative be that the army shall suffer for want of the provisions, or the seller of them suffer because the *contract*, not having been deposited with the Comptroller, is void?

His duty is to see to the transportation of provisions and munitions of war. Must every *contract* as to these be in writing, and, before being valid, must it be sent to Washington to the Comptroller's office? If this is the law, as claimed by the Quartermaster General, his depart-

ment *violates that law every day, and has done so since he has been in office*, and so have all the officers of that department ever since it was organized, from the very nature of the duties to be performed and the necessity of the case. Never, in relation to any portion of the army, in the field or at military stations, has this extraordinary principle been applied, and was not so applied when these letters were written, and is not so applied to-day.

It must have been from gross inadvertence that the Quartermaster General shall have announced the principle that a contract by the quartermaster in command in Texas with a third person, to furnish a load for seventeen wagons from one place to another, was a void one, because it was not deposited within ninety days of its date with the Second Comptroller at Washington.

If the principle is a sound one, he is violating the law daily ; if an unsound one, he has done this petitioner a great injustice.

2d. But there is another answer to this, even if this were one of the contracts referred to in the statute. This section, as to depositing contracts with the Second Comptroller, is *directory* merely upon the public officers, and not essential to the validity of contracts. It not only is not declared by the law to be essential to the validity of any contract that it be so deposited, but the very nature of the provision shows that it is for the mere convenience of the government that the contracts referred to should be found in one place. It requires no *act* on the part of the Comptroller to give validity to the contract. Besides, the act of deposit is one which is to be done by an officer of the government, and it would be most unreasonable to give such a construction as would make an innocent contractor a sufferer by the culpable omission of an agent of the other party. Such a construction would be dishonorable to the government, as it would, in the worst sense, enable a party to take advantage of his own wrong.

3d. But the other reasons for refusing this claim by the Quartermaster General are not less extraordinary and untenable. In his letter of February 27, 1856, to Major Chapman, he says: "*You had no right to make a verbal contract.*" It is not very material whether he had or not, in relation to the one to which he here refers, for one year, since that contract, before being reduced to writing, was, at Major Chapman's request, abandoned. "*And if you, from the necessities of the service, were compelled to employ any one for a single trip, or more than one trip, it was your duty to include him and his means of transportation in your monthly reports.*"

Here is distinctly recognized the authority, if he deemed it necessary, to employ any one, not only for one trip, but for more than one trip. But it would seem to be the notions of the law in that department that if not included in his "monthly report," it would thereby become illegal.

Again: "*In this case it now appears that a verbal contract, illegally made, has been going on for a whole year,*" &c. Nothing whatever of the kind appears, but precisely the reverse.

4th. But in his letter of the 7th January, 1857, the Quartermaster General very coolly turns over the petitioner to his claim against Major Chapman. He says: "*Mr. Samaniego may have a just claim*

against Major Chapman, but he has no just claim against the public. Every man is supposed to understand the laws of the country, and if he disregards them he acts in his own wrong, and that the government is not responsible for his neglect," &c. The supposition here referred to, that "every man understands the laws of the country," is a presumption in respect to this distinguished officer which his own letters must abundantly disprove. It is scarcely possible to find, in the same space, more bad law and mistaken statements of facts.

It is *not* the law that the government is not bound by the acts of its public officers, acting under its authority, and within the scope of that authority.

It is *not* the law that a contract, in other respects valid, is made invalid because the officer of the government making it fails to include it in his quarterly report.

It is *not* the law that a contract, otherwise valid, is made invalid by the omission on the part of the government to deposit the contract in the Comptroller's office.

It is *not* the law that all *verbal* contracts by a quartermaster in the daily and ordinary discharge of his duty are void; and if it were the law, it has no bearing upon this case, because the contract in question was a written one.

There is no charge whatever against the petitioner. The only complaints made are by the head of the quartermaster's department of one of his subordinate officers. The reproof, if not wholly undeserved, as it would indeed seem to be, is certainly unduly severe; but whether just or unjust, it is a poor reason for depriving a third person, charged with no wrong or negligence, of his just rights.

III. That this contract has been violated is not denied, and that the petitioner has suffered damage is also admitted. The statement of Col. Myers is as follows:

"OFFICE A. Q. M., DEPARTMENT OF TEXAS,
"San Antonio, December 19, 1856.

"SIR: I enclose herewith a claim of Fernando Samaniego for demurrage with a train of seventeen ten-mule wagons at Fort Clark, Texas. Letters from Major W. W. Chapman, assistant quartermaster, and Captain Van Bokkelen, assistant quartermaster, accompanying the claim, on the basis on which it is founded. Without regard to the several items in the account which make up the sum charged, it appears just that a daily sum for each wagon should be allowed as demurrage while awaiting at Fort Clark the orders of officers in the quartermaster's department to load with and transport public supplies. It will be perceived that the certificates of Captain Van Bokkelen, giving the dates at which the wagons were reported to him, vary one day; but the extreme date, nevertheless, that the wagons were detained at Fort Clark make one day more, taking from 23d of August to 25th November, than is charged in the account herewith.

"The item charged for forage and issue of twelve pounds a day to each mule ought not to be admitted. The price paid for corn at Fort Clark by the quartermaster's department at the time the citizens' train was there was \$1 10 and \$1 20 per bushel. The issue of twelve

pounds of corn to each mule can scarcely be the custom of citizens in feeding their animals, particularly at the season of the year when grass is abundant. My orders to officers in the department are not to feed grain to the public animals when grass is good and they are not at work.

“It would seem equitable in reference to the charge for forage, to believe that the transporters, in daily expectation of being called on to load their wagons and to start on any trip, would endeavor to have their animals in strength and condition to do their work, and, with such view, fed some grain daily to them—say four or five pounds for each animal.

“A. C. MYERS,
Brevet Colonel, A. Q. M.

“Major General TH. S. JESUP,
Quartermaster General, Washington.”

If, as is stated by the accounting officers of the treasury, they are not authorized to make compensation for damages arising from a breach of contract, but the power rests alone in Congress, the case is clearly one which is appropriately before this court for decision, and to determine as to the amount of the damages sustained.

JOHN A. ROCKWELL,
Of Counsel for Petitioner.

IN THE COURT OF CLAIMS.

FERNANDO SAMANIEGO *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF ON FINAL HEARING.

Claim for demurrage, that is, damages by reason of the quartermaster's department not furnishing loading to be transported by claimant's teams from Fort Clark to Fort Davis, in Texas.

FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. That in 1855 W. W. Chapman, assistant quartermaster, made a verbal contract with the claimant to haul certain army supplies for one year from Fort Clark to Fort Davis, in Texas.—(Chapman's letter, Record, p. 8.)

Second That on learning that a contract had been entered into by the government with Giddings & Jefferson, the claimant relinquished his contract with Chapman on a promise by the latter that he would give him all the hauling he could.—(Chapman's letter, Record, pp. 8 and 10.)

Third. Being at Fort Clark on the 24th of June, 1855, the claimant, through Captain Van Bokkelen, informed Major Chapman that he should return to that place on the 20th of August, and inquired if

there would be a load there for him at that time, and if not he would not return.—(Bokkelen's letter, Record, p. 6.)

Fourth. Major Chapman, on the 10th of July, answered Captain Bokkelen, and directed him "to inform the claimant that there would be a load for his train at Fort Clark by the 20th of August.—(Chapman's letter, Record, p. 6.)

Fifth. On the 3d of September, 1855, Captain Bokkelen, writing from Fort Clark to Major Chapman at Corpus Cristi, informed him that the claimant arrived at the former place on the 22d of August, and that nothing had been heard of any stores coming forward for his train.—(Bokkelen's letter, Record, p. 7.)

Sixth. That the claimant waited at Fort Clark with a train, consisting of 17 large wagons, from the 22d of August to the 25th of November, when he received stores for them to take to Fort Davis.—(Bokkelen's letter, Record, pp. 7, 8.)

Seventh. The stores were "delayed from bad weather and roads."—(Bokkelen's letter, Record, p. 8.)

Eighth. That there was a contract in writing with Giddings & Jefferson for transporting stores, which, by its terms, included the transportation of the stores in question, which was known to Major Chapman and to the claimant.—(Chapman's letter, Record, pp. 8 and 10; General Jesup's letter, Record, pp. 12, 13.)

Ninth. This transaction with Samaniego was repudiated by the Quartermaster's department as soon as it became known to it.—(General Jesup's letter, Record, pp. 12, 13; Colonel Thomas' letter, Record, p. 14.)

Tenth. There is no contract proved by which it was provided that there should be stores at Fort Clark for the claimant to transport.

Aside from the objection that there was no written contract, there is no proof of even a verbal one. Major Chapman says he promised "to give him all the hauling he could."—(Record, p. 8.)

The claimant, soon after the 10th of May, was at Corpus Christi, and went to San Antonio, and returned prepared to make a contract, when Major Chapman was informed of the contract entered into by the War Department with Giddings & Jefferson. Major Chapman says :

"He (the claimant) returned from San Antonio prepared to make a contract in writing, but in the meantime I received information of the contract made with Giddings & Co., and told Mr. Samaniego frankly how I was situated; also, that I presumed the contract with those parties could not go into immediate effect, and that if he would relieve me from the verbal arrangement made with him, I would give him all the freight I could without interfering with the contract of Giddings & Co.

"This he consented to. I told him that on the return of his train to Fort Clark there would probably be loading there for him; but it seems there was not, and his train remained there some months waiting for a load."—(Major Chapman's letter, Record, p. 10.)

Eleventh. The whole of this arrangement rested upon the condition that freight could be supplied without interfering with the contract of Giddings & Co.

But it is indisputable that the latter were entitled to the whole, and none could be so furnished without a violation by the government of that contract.

Again: Another condition was, that Major Chapman could furnish it. He could not furnish freight at Fort Clark unless it was there, and none was there, and it seems that owing to the weather and roads it could not be got there. The promise of Major Chapman was, not that he would cause freight to be got to Fort Clark, so that the claimant could get it, but that he would give him what was there to be taken if he could. He could not give it to him there if it were not there to be given.

Twelfth. The claimant was not under any obligation whatever to transport the stores in question. There was no reciprocal obligation on his part to perform any service. He could not have been sued and subjected to damages, if any were sustained, if he had refused to transport the stores. Major Chapman made no contract with him, but gave him to understand he would give him freight when he could. When he inquired if there would be stores at Fort Clark at a certain time, he said there would be, but he was not bound to have them there, nor even to give them to him, if they were, nor was the claimant under any legal obligation to be there and take them.

LEGAL PROPOSITIONS.

FIRST. *Except in cases of special necessity, no contract for transportation for the Quartermaster's department can be lawfully made except in writing and entered into upon public advertisement.*

The claimant proves that his contract, as he claims it to have been made, was a mere verbal promise, not reduced to writing, entered into after he and Major Chapman knew that the freightage legally belonged to Giddings & Co. under a binding contract. Several laws have been passed to prevent the making of such contracts, and for the purpose of rendering them null if entered into.

The act of July 16, 1798, (1 U. S. L., 610,) provides:

§ 3. "That all purchases and contracts for supplies or services for the military and naval service of the United States shall be made by or under the direction of the chief officers of the Departments of War and Navy, respectively, and all agents or contractors for supplies or services as aforesaid shall render their accounts for settlement to the accountant of the proper department for which such supplies or services are required, subject, nevertheless, to the inspection and revision of the officers of the treasury in the manner before described."

§ 6. "That all contracts to be made by virtue of this act, or of any law of the United States, and requiring the advance of money, or to be in any manner connected with the settlement of public accounts, shall be deposited in the office of the Comptroller of the Treasury of the United States, within ninety days after their dates, respectively."

The act of the 21st of April, 1808, (2 U. S. L., 484-'5,) forbids members of Congress being concerned in any contract with the United States, and requires the heads of departments to make annual state-

ments of the contracts they may enter into, "exhibiting in such statement the name of the contractor, the article or thing contracted for, the place where the article was to be delivered, or the thing performed, the sum to be paid for its performance or delivery, and the date and duration of the contract."

The act of March 3, 1809, (2 U. S. L., § 5,) provides:

"That all purchases and contracts for supplies or services which are or may, according to law, be made by or under direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made either by open purchase or by previously advertising for proposals respecting the same."

It then provides for reporting to Congress.

The act of March 3, 1845, (5 U. S. L., 795, § 12,) regulates the mode of advertising.

The practical construction of these laws given by the War Department is the same now assumed, as will be found in the letters of General Jesup.—(Record, pp. 12 and 13.)

From these laws and their practical and uniform construction, it is clear that what the claimant assumes to have been a contract was a mere nullity. It was knowingly made, not only without the authority of law, but against the provisions of the statute, and is therefore a mere nullity, upon which no valid claim can be founded.

SECOND. Where the whole transportation had been regularly and legally contracted to another, no valid contract could be subsequently given to a third party for any portion of such transportation, where there had been no failure of performance.

The whole transportation had been given to Giddings & Co. before Major Chapman's promise to the claimant, which both knew, and there is no evidence that they failed to perform their part. Any attempt to take from them a portion of what they were entitled to was a fraud upon them, which would vitiate any subsequent contract. The claimant's rights rest entirely upon this fraud. If, in the consummation of it, he made less than he expected, or actually lost, no judicial tribunal can afford him relief.

THIRD. What passed between Major Chapman and the claimant did not constitute a contract.

To constitute a contract each party must be bound to the performance of some obligation. In this case the claimant does not set up or prove that he obligated himself to perform any act. While he believed he could realize large profits by performance, he would, of course, transport the stores; but if events had so shaped themselves that a loss was certain to follow performance, the government had no hold upon him in case he refused. All that there is in this case is an assurance on one side, but none on the other forming a consideration to sustain such a promise. The whole thing was a nullity.

FOURTH. *The contract, if one was made, was conditional, and the contingencies upon which it rested did not occur between the claimant's return to Fort Clark and the receiving the stores.*

The contract, if there was one, was made when the claimant returned from San Antonio, as stated in Major Chapman's letter, (Record, p. 10,) which was to give him all the freight he could without interfering with the contract of Giddings & Co.

The facts clearly show—

1. That up to the 25th of November there was no freight at Fort Clark which he could give him.

When freight did arrive at Fort Clark so that it could be given to him, he was furnished with it, and consequently there was no violation of the contract. The claimant received the freight as soon as the contingency happened upon which his right depended.

2. They also show that no freight whatever could have been furnished the claimant without interfering with the contract of Giddings & Co.

This being so, he was not entitled to receive any freight at all at any time, and therefore has no claim for any losses he may have sustained.

If the occurrences at Corpus Christi, in which Major Chapman gave the assurance above referred to, did not constitute a contract, then none was made. The inquiry made by the claimant through Captain Bokkelen, and the answer returned by Major Chapman, do not constitute a contract. Nothing, then, occurred to bind either party.

The claimant did not bind himself to return to take a load, and nothing was said of the size of the train. Nothing was said in Captain Bokkelen's note concerning making a contract for transportation, nor in Major Chapman's. The latter expected there would be a load there for the claimant, but he did not contract that there should be such load; nor did he agree if he would come and had to wait for one he would pay him for waiting until he could get one.

FIFTH. *The claimant has not shown that Major Chapman had any authority to make such a contract as he alleges was made with him.*

The claimant proceeds upon the ground that Major Chapman was the agent of the government in making the contract in question. But he makes no proof of that fact. His official position authorized him to do certain things as official duty; but it is not shown that he was authorized either by law or by the direction of the head of his department to make such a contract. On the contrary, the Quartermaster General disavows the contract and denies his power to make it.

It rests with the claimant to show the authority, which cannot be assumed without proof. His not having done so, the inference is irresistible that he did not possess it. If there really was such a contract as the claimant assumes, and it was made without authority, then his remedy is not upon the government, but upon the person

who assumed and exercised authority which he did not possess. The government can only be liable when it conferred authority upon an agent to make a contract binding upon it. If Giddings & Co. had such a contract as is represented, they would have a far better claim for damages to the extent of the profits made on the freight given the claimant after the date of their contract, if they were on hand ready to perform, than the latter has for waiting at Fort Clark to deprive them of such profit. The claimant cannot rightfully complain, because he knew that he was depredating upon the rights of others in procuring the freight he obtained. But however all this may be, he cannot sustain a claim against the government without showing that Major Chapman had authority to make the contract set up, which he has wholly failed to do.

SIXTH. *There is no proof that Major Chapman requested the claimant to remain at Fort Clark for freight, and therefore he has no just claim to compensation for waiting.*

The claim as set up in the petition in this case is, that Major Chapman promised to give him a load of freight from Fort Clark to Fort Davis if he returned to the former place; and that when he returned there was no freight for him, and therefore he waited over three months for it. There is not a particle of proof that Major Chapman requested him to remain, either at the time he authorized Captain Bokkelen to inform him there would be freight for him, or after he returned to Fort Clark and found no freight there. There is no allegation of any such fact in the petition.

When he arrived at Fort Clark and found there was no freight for him, under the case as stated by himself, he was not authorized to remain there and wait until freight should be furnished. He should have left there to attend to his own business; and if he had a legal contract, he would have been entitled to demand the amount of profits he could have made under such contract. If he chose to remain, he did so upon his own responsibility. Unless his contract was for him to remain, he could not lawfully do so under it.

His witness, *Dagure*, (Record, p. 16,) testifies that a trip from Fort Clark to Fort Davis is usually made in eighteen days. It could probably return within thirteen, making in all a month. The claimant had taken two loads previously. For the first he received \$3,331 68, and for the second \$3,572 04, (Record, p. 18,) the average being \$3,451 86, which would be the average receipts for a month.

Three months at this rate would amount to.....	\$10,355 58
He states his expenses for three months at, (Record, p. 14,)	8,051 14

Showing that his profits on three loads could only be.....	2,304 44
--	----------

Or \$768 14 for one month, being all he could lawfully claim if he had had a valid contract, and he had met with no accidents.

Instead of leaving when he found there was no freight, and demanding the amount of profits he could have made on a load, he chose to

remain idle for three months, and now demands \$15,871 14. No known rule of law will sanction such a claim. He had the same right to remain there three years that he had to do so for three months, and charge at the same rate, if freight had not previously arrived for him. But there was neither a contract which authorized him to remain or to demand freight at all, unless it was there for him, and consequently no damages can be lawfully claimed.

R. H. GILLET, *Solicitor*.

AUGUST 31, 1858.

IN THE COURT OF CLAIMS.

MAY 30, 1859.

FERNANDO SAMANIEGO *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the court.

This is a claim founded on contract. Damages claimed, \$15,871 14. The contract is to be ascertained from the following correspondence:

“ASSISTANT QUARTERMASTER’S OFFICE,
“*Fort Clark, Texas, June 24, 1855.*

“MAJOR: F. Samaniego is here with his train, and will leave Fort Davis about the 10th of July, returning to this post 20th August. He wishes to know if a load will be here at that time for him; if not, he will not return.

“W. K. VAN BOKKELEN.
“*Capt. A. Q. M.*

“Major W. W. CHAPMAN,
“*Acting C. A. Q. M., Corpus Christi.*”

“ASSISTANT QUARTERMASTER’S OFFICE,
“*Corpus Christi, Texas, July 10, 1855.*

“CAPTAIN [Extract]: Your letter of June 24 was duly received. Please inform F. Samaniego that there will be a load for his train at Fort Clark by the 20th of August.

“W. W. CHAPMAN,
“*Acting Chief A. Q. M., Department of Texas.*
“Captain W. K. VAN BOKKELEN, *A. Q. M.*”

In accordance with the above letter of Major Chapman, Captain Bokkelen informed Mr. Samaniego that there would be a load for his train at Fort Clark by the 20th of August.

On the 22d or 23d of August, 1855, Mr. Samaniego arrived at Fort Clark and reported to Captain Bokkelen with a train of seventeen wagons; but the government had no loading then for the wagons, and Mr. Samaniego remained at Fort Clark with his teams and men until the 25th of November, 1855, waiting for loading. On that day

he received the stores which had just arrived at Fort Clark from Corpus Christi, and which were intended to be at Fort Clark on the 20th of August, but had been delayed by bad weather and roads.

The object of this suit is to recover damages for the delay from the 20th of August to the 25th of November, 1855, in the furnishing of said loading to the claimant.

One of the objections of the solicitor to this contract is, that there is no consideration for the promise of the quartermaster to furnish the loading. There is no doubt that, unless Samaniego promised to receive the loading at Fort Clark on the 20th of August, 1855, and transport it to the proper place, the quartermaster's promise to furnish him with the loading on that day was not binding for the want of consideration. But the solicitor has not satisfied us that Samaniego did not make such a promise. We need not, however, stop to examine that point, as there is another objection to the action which we consider to be fatal. That objection is, that Samaniego did not arrive at Fort Clark with his teams until after the 20th of August, 1855, and was not, of course, ready on that day to receive the loading. The furnishing of the loading by the quartermaster, and the receiving of it by Samaniego to be carried, on the 20th of August, were concurrent acts, and neither party could sue for a breach without showing a readiness to perform his part of the contract on the specified day.—(Chitty on Contracts, 638.)

Neither party being ready on the appointed day, the contract was, at law, *ipso facto* dissolved.—(Clarke vs. King, 1 R. and M., 394 S. C., 2 C. and P., 286.)

It may not be improper to notice that there is no reason to suppose that the quartermaster who was to furnish the loading in question was intentionally in default. The loading was to be brought from Corpus Christi to Fort Clark, and was intended to be at Fort Clark by the 20th of August aforesaid, but was delayed by the badness of the weather and roads.

The damages claimed in this suit are those which, it is alleged, the claimant sustained by waiting (at Fort Clark) for loading for his wagons from the 23d of August, 1855, to the day on which the stores, then just arrived at Fort Clark from Corpus Christi, were delivered to him, viz: the 25th of November, 1855. But it does not appear that his waiting for the loading was at the request of any agent of the government, but was, so far as we are informed, his own voluntary act for the furtherance of his own views, whatever they may have been. If the carrier in such case be ready on the day, the non-delivery of the loading to him is a cause of action, and the profits that would have been made by the trip is, ordinarily, the measure of damages.

The claimant in the present case, not having been ready on the specified day, has no right to recover.

NEHEMIAH B. NORTHROP, ADMINISTRATOR OF JOHN
LANGDON.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee
of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United
States in Congress assembled.*

The Court of Claims respectfully presents the following documents
as the report in the case of

NEHEMIAH B. NORTHROP, ADMINISTRATOR OF JOHN
LANGDON, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Original documentary evidence in the case transmitted to the
House of Representatives.
3. Claimant's brief.
4. United States Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said court at Washington, this fifth day of December,
A. D. 1859.

SAM'L H. HUNTINGTON.
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

NEHEMIAH B. NORTHROP, administrator of JOHN LANGDON, *vs.* THE
UNITED STATES.

To the honorable the Judges of the Court of Claims:

The petition of Nehemiah B. Northrop of the city of Rochester, in
the county of Monroe, in the State of New York, administrator of the
estate of John Langdon, deceased, respectfully represents: that the
said John Langdon was appointed on the 5th day of June, 1812, by
the Honorable William Eustis, then Secretary of War, a deputy com-

missary in the army of the United States ; that he accepted said appointment, and entered into bond with sufficient security for the faithful performance of the duties required of him, and continued to serve in that capacity to the 30th day of June, 1815 ; that his duties were prescribed in the 5th section of the act of 28th March, 1812, (Statutes at Large, volume 2, page 696,) which directs him to be under the direction of the commissary of purchases, or, in cases of necessity, the commanding general, quartermaster general, or deputy quartermaster, to purchase all arms, military stores, clothing, and generally all articles of supply requisite for the military service of the United States. By the 7th section of the same act, it is declared that the compensation of a deputy commissary shall not exceed $2\frac{1}{2}$ per cent. on the amount of public moneys disbursed by him, nor in any instance the sum of two thousand dollars per annum ; and by the 2d section of the same act, the compensation of an assistant deputy quartermaster is fixed at forty dollars per month, three rations per day, and forage for one horse—equal in money to about seven hundred and ninety-five dollars per annum, exclusive of quarters. By the 5th section of the act of 3d March, 1813, (Statutes at Large, vol. 2, page 816,) the duties of deputy commissaries of purchases were modified and more clearly defined, and directs that the Secretary of War prescribe the species as well as the amount of supplies to be respectively purchased by the commissary and quartermaster's departments, and the respective duties and powers of said departments respecting such purchases.

Your petitioner further states, that the said John Langdon, within the periods above mentioned—to wit, the 5th day of June 1812, and the 30th June, 1815—disbursed a large amount of money for the use and service of the army of the United States, all of which he faithfully accounted for in the final settlement of his accounts at the Treasury of the United States. That in the course of his said service and disbursements, it frequently happened that he was without public funds in his possession, and was necessarily obliged, in order to meet the public demands and exigencies, to purchase the requisite supplies either with his own private funds, upon money loaned to him for that purpose, or upon his own individual responsibility upon credit, and upon which he was compelled to pay interest, as is shown by the statement of his accounts hereto annexed, No. 1.

Your petitioner further shows, that on various settlements of the accounts of the said John Langdon at the treasury, large balances were found to be due him, growing out of the advances of his own private funds, of money borrowed and supplies purchased on credit upon his individual responsibility, as above stated, which balances remained unpaid by the treasury for many months ; and when remitted, were paid in treasury notes, then at a discount of about fifteen per cent. from their par value ; that in many instances the public creditors refused to receive said treasury notes in payment of the supplies furnished by them, except at a large discount, more particularly those to whom he was individually responsible either for supplies furnished or money loaned to him for the purposes above indicated. Your petitioner therefore claims that the estate of the said John Langdon should be reimbursed for the losses thus incurred, either by an allowance in

the shape of interest upon the aforesaid balances, or for the depreciation in value of the said treasury notes paid to him in lieu of specie or other par funds advanced by him for the use and benefit of the United States, as per annexed account, No. 2.

Your petitioner further states, that the compensation fixed by law to deputy commissaries of purchases was a commission of $2\frac{1}{2}$ per cent. upon the amount disbursed, not to exceed an annual compensation of two thousand dollars; that the commission of $2\frac{1}{2}$ per cent. upon the amount disbursed by the said John Langdon within the entire period of his service amounted to a sum largely exceeding the annual compensation of two thousand dollars, but for the last three quarters of his said service—to wit, from the first of April to the last day of December, 1815—the commission of $2\frac{1}{2}$ per cent. amounted to less than the annual compensation would have amounted to. He was only allowed, on the settlement of his accounts, the commission, amounting to \$304 83, instead of \$1,500, the rate of his annual compensation. Your petitioner claims that the said John Langdon was legally entitled to the latter rate of compensation from the commencement to the termination of his service, under the express provision of the law fixing the compensation of deputy commissaries at the rate of two thousand dollars per annum, being less than $2\frac{1}{2}$ per cent. commission on the amount of his disbursements during the entire period of his service. See account hereto annexed, No. 3.

Your petitioner further states, that the aforesaid John Langdon likewise performed the duties of deputy quartermaster, under the authority and with the sanction of the Secretary of War, and disbursed large amounts of money for that service, for which he received no adequate compensation, and that the duties thus performed were not within the scope of his legitimate duties of deputy commissary. Your petitioner claims that the said John Langdon was entitled to the compensation fixed by law for the deputy quartermaster, instead of the commissions allowed in the settlement of his accounts at the treasury, as shown by his account hereto annexed, No. 4.

Your petitioner further states that the said John Langdon also performed the duties of issuing commissary for the period of about three years, for which he claims the annual compensation of \$1,200 which has not heretofore been allowed to him, as shown in his account hereto annexed, No. 5.

The various claims above mentioned are more particularly described and set forth in the appendix hereto, to which your petitioner respectfully refers, and begs to have taken as a part of this petition.

Your petitioner further states, that the said John Langdon presented a petition to the House of Representatives at the 1st session 31st Congress, which was referred to the Committee on Claims, no action been had thereon; it was again referred to the same committee at the 2d session 32d Congress, and again at the 1st session 33d Congress, and no action thereon.

He further states that he, as the administrator of the said John Langdon, is the sole owner of said claims, not having made any transfer or assignment thereof.

Your petitioner prays your honors to inquire into the several matters, and to grant him such relief in the premises as to law and justice may appertain.

NEHEMIAH B. NORTHROP,
Administrator, &c.

APPENDIX.

No. 1.

The United States to John Langdon,

DR.

1813.		
July 23.	To interest paid James Rundlet, per vouchers 1 and 2.....	\$437 83
	To interest paid H. & A. Ladd, per vouchers 3 and 4.....	107 24
June 9.	To interest paid W. R. Gray, per voucher 5.....	60 69
1816.		
Oct. 21.	To interest paid John Darling, per voucher 6...	72 64
		678 40

No. 2.

1814.		
March 14.	To interest on \$83,704 from date to May 26, 1814, being the balance found due to him on settlement of his account 1st quarter 1814, 56 days, voucher 11.....	\$770 57
	To interest on \$33,704 to June 30, 1814, being 68 days.....	376 74
	To interest on \$76,025 80, per adjustment of his accounts 2d quarter 1814, for which a warrant was issued and remained unpaid to 21st March, 1815, when the warrant was withdrawn, and a new one issued, which was paid in treasury notes then at a discount of 15 per cent., and received by him at the above date, 264 days, per vouchers 1, 2, 3, and 5	3,299 95
	To interest on \$53,514 74, balance of his account 3d quarter 1814, per adjustment, for which a warrant was issued as above and no remittance received until 21st March, 1815, as above, 172 days, per vouchers 4 and 5...	1,513 07
	To interest on \$7,746 78, balance per adjustment of his accounts 4th quarter 1814, vouchers 2 and 7.....	114 61
March 31.	To interest on \$36,143, per adjustment of accounts for 1st quarter 1815, to September 30, 6 months, per vouchers 6 and 12.....	1,084 29

June 30. To interest on \$10,877 87, per adjustment for 2d quarter 1815, to 25th October, 1815, 117 days, per voucher 8.....	209 21
	<u>\$7,368 44</u>

No. 3.

To his compensation as deputy commissary of purchases from 31st of March, to 31st December, 1815, 9 months, the commissions of $2\frac{1}{2}$ per cent. prescribed by law having exceeded \$2,000 per annum during his term of office, but during the last three quarters amounting only to \$304 83, the sum allowed him—the law allow- ing $2\frac{1}{2}$ per cent. on disbursements not to exceed \$2,000 per annum during the term of service.....	1,500 00
Less amount of commissions allowed.....	304 83
	<u>1,195 17</u>

No. 4.

1816

June 19. To his services as assistant deputy quartermaster general from 19th December, 1813, to date— 30 months, at \$40 per month.....	1,200 00
To 2,736 rations, at 20 cents.....	547 20
To $32\frac{1}{2}$ cords of wood, being the allowance to a deputy quartermaster general, at \$6 per cord.	195 00
To quarters for $2\frac{1}{2}$ years, at \$70 per year.....	175 00
To forage for one horse for 30 months, at \$8 per month	240 00
	<u>2,357 20</u>
Less this sum allowed, being a commission of $2\frac{1}{2}$ per cent. on disbursements.....	797 11
	<u>1,560 09</u>
Less for forage not charged in his account.....	240 00
	<u>1,320 09</u>

No. 5.

To his services as issuing commissary, observing that the duties of the Quartermaster's department, so far as regards transportation, were performed by him two years previous to his appointment of assistant deputy quartermaster general, without any compensation, adding that he claims the pay of issuing commissary, which has been allowed to A. Stetson, deputy com- missary at Boston, and others; he charges \$1,200 per annum, the pay of issuing commissary for three years.....	3,600 00
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No. 1—Claim for.....	678 40
2—Claim for.....	*7,368 44
3—Claim for.....	1,195 17
4—Claim for.....	1,320 09
5—Claim for.....	3,600 00
	14,162 10
*Less this sum, allowed as interest on James Rundlet's contract, included in above statement.....	3,018 87
	\$11,143 23

IN THE COURT OF CLAIMS.

NEHEMIAH B. NORTHPROP, administrator of JOHN LANGDON, *vs.* THE UNITED STATES.

List of papers and documents filed by petitioner as evidence in support of his claim, viz :

1. Petition to Court of Claims.
2. John Langdon's account, endorsed "memorial of John Langdon," &c., to Congress.
3. Letter from Wm. Eustis, dated January 5, 1812, appointment as deputy commissary.
4. Letter of instructions from Wm. Eustis, July, 16, 1812.
5. Accounts and vouchers for interest paid, with letter from P. Hagner, dated March 20, 1822, and explanatory letters from John Langdon to the Secretary of War of March 28 and May 7, 1822.
6. Letter from Wm. Simmons, dated April 25, 1814.
7. Do. do. dated May 9, 1814, with statement of differences enclosed.
8. Letter from Tobias Lear, dated September 8, 1814.
9. Do. do. dated November 7, 1814.
10. Do. do. dated February 21, 1815.
11. Do. Thos. T. Tucker, dated February 21, 1815.
12. Do. Tobias Lear, dated February 22, 1815.
13. Do. do. dated March 8, 1815.
14. Do. do. dated April 11, 1815.
15. Do. do. dated July 3, 1815, with statement of differences.
16. Letter from Tobias Lear, dated July 28, 1815, with statement of differences.
17. Letter from Tobias Lear, dated August 23, 1815.
18. Do. do. dated March 12, 1816.
- Do. Thos. T. Tucker, dated March 12, 1816.
- 2 Do. Joseph Nourse, dated March 13 and March 14, 1816.
19. Do. C. Irvine, dated October 14, 1813.
20. Do. do. dated November 25, 1814.
21. Do. do. dated August 17, 1813.
22. Do. do. dated November 24, 1814.

23. Letter from Secretary of War, dated February 8, 1853.
24. Do. John Langdon to Sec'y of War, Aug. 13, 1813.
25. Do. same to C. Irvine, August 15, 1813.
26. Do. C. Irvine to Secretary of War, Sept. 3, 1813.
27. Do. J. Langdon to same, September 6, 1813.
28. Do. C. Irvine to same, September 13, 1813.
29. Do. J. Langdon to same, October 26, 1813.
30. Do. same to same, November 24, 1813.
31. Do. same to same, December 7, 1813.
32. Do. same to same, January 22, 1814.
33. Do. same to same, February 15, 1814.
34. Do. same to same, March 2, 1814.
35. Do. C. Irvine to same, April 5, 1814.
36. Do. J. Langdon to same, April 20, 1814.
37. Do. same to same, May 7, 1814.
38. Do. same to same, June 4, 1814.
39. Do. same to same, July 25, 1814.
40. Do. Secretary of War to J. Langdon, August 5, 1815.
41. Do. same to same, October 21, 1815.
42. Do. John Langdon to Secretary of War, Oct. 26, 1815.
43. Do. same to same, November 16, 1815.
44. Do. same to same, February 21, 1816.
45. Do. Secretary of War to J. Langdon, March 9, 1816.
46. Do. same to same, April 9, 1822.
47. Do. Amasa Stetson to same, December 10, 1822.
48. Do. same to same, September 24, 1824.
49. Three letters from Hon. S. Bell to same, dated May 29, 1826, December 25, 1832, and December 26, 1836.
50. Letter from F. Bush, Third Auditor, to Hon. A. P. Edgerton, January 17, 1854.
51. Letter from same to same, April 4, 1854.
52. Do. Jno. Langdon to Hon. C. W. Peaslee, February 25, 1852.

JOHN LANGDON'S ACCOUNT.

Dr. *The United States to John Langdon, Deputy Commissary.*

1813.		
July 23.	To interest paid James Rundlet, per vouchers Nos. 1 and 2.....	\$437 83
	To interest paid H. and A. Ladd, per vouchers Nos. 3 and 4.....	107 24
June 9.	To interest paid W. R. Gray, per voucher No. 5.....	60 69
1816.		
Oct. 21.	To interest paid Josh. Darling, per voucher No. 6.....	72 64
		678 40

1814.

Mar. 31.	To interest on \$83,704 from date to May 26, 56 days, being the balance of my accounts the first quarter of 1814, per voucher No. 11.....	770 57	
	To interest on the balance, \$33,704, to June 30, 68 days, per voucher No. 11.....	376 74	
			1,147 31
	To interest on \$76,025 80, per adjustment of my account the second quarter of 1814, for which amount a warrant was issued by the Secretary of War upon the treasury of the United States, which remained unpaid to March 21, 1815, when the warrant was withdrawn and a new one issued, which was paid in treasury notes, then at a discount of 15 per cent., and received by me at the above date, 264 days, per vouchers Nos. 1, 2, 3, and 5.....	3,299 15	
	To interest on \$53,514 74, balance of my accounts for third quarter of 1814 per adjustment, for which a warrant was issued as above; no remittance received until March 21, 1815, as above, 172 days, per vouchers Nos. 4 and 5.....	1,513 07	
	To interest on \$7,746 78, balance per adjustment of my accounts for 4th quarter of 1814, per adjustment, per vouchers Nos. 2 and 7.....	114 61	
Mar. 31.	To interest on \$36,143, per adjustment of accounts for first quarter of 1815, to September 30, 6 months, per vouchers Nos. 6 and 12.....	1,084 29	
June 30.	To interest on \$10,877 87, per adjustment second quarter of 1815, interest to October 25, 117 days, per voucher No. 8.....	209 21	
			6,221 13
	To three years' services as issuing commissary. The duties of the Quartermaster's department, so far as regards transportation, were performed by me two years previous to my appointment of assistant deputy quartermaster general without any compensation. I claim the pay of		

issuing commissary, which has been allowed to Mr. Stetson, deputy commissary, of Boston, and Mr. Tracy, Connecticut. I charge \$1,200 per annum, the pay of commissary of issues for three years.....

3,600 00

1816.

Jan. 1. To my compensation as deputy commissary of purchases from March 31 to date, three quarters of a year; the commission upon my purchases, as prescribed by law, having exceeded \$2,000 per annum during my term of office, but during the last three quarters amounting to only \$304 83, the sum allowed me, the law allowing $2\frac{1}{2}$ per cent. on purchases, not to exceed \$2,000 per annum during the term of office....

1,500 00

Deduct amount allowed.....

304 83

1,195 17

12,842 01

Cr.

1816.

August. By this sum allowed as interest on James Rundlet's contract, included in the above statement.....

3,018 87

9,823 14

I also claim interest on interest paid by me, as per vouchers, from time of payment; upon interest on warrants issued by the Secretary of War whilst suspended for want of funds; also, on the interest upon all other liquidated balances from the time of settlement of my accounts, and upon additional compensation considered as due on the settlement of my accounts.

Secretary of War to John Langdon.

WAR DEPARTMENT, *June 5, 1812.*

SIR: You are hereby notified that you have been appointed a deputy commissary in the army of the United States.

On the receipt of this letter you will please to communicate to this department your acceptance or non-acceptance of this appointment; and in case of acceptance, you will transmit to this department a bond, ex-

ecuted conformably to the law of March 28, 1812, a copy of which is herewith enclosed.

Respectfully, your obedient servant,

W. EUSTIS.

JOHN LANGDON, Jr., Esq.,
New Hampshire.

ACCOUNTS AND VOUCHERS FOR INTEREST PAID.

The United States War Department to John Langdon, jr., deputy commissary.

1815.		
Sept. 1	To interest paid James Rundlet, per vouchers Nos. 1 and 2.....	\$437 83
	To interest paid H. & A. Ladd, per vouchers Nos. 3 and 4.....	107 24
	To interest paid by W. R. Gray, per voucher No. 5.....	60 69
1816.		
Oct. 9	To interest paid Joshua Darling, per voucher No. 6.....	72 66
		678 40

N. B.—I have endorsed the original vouchers, which you will please return to me, unless the account should be allowed.

Secretary of War to John Langdon.

WAR DEPARTMENT, *July 10, 1812.*

SIR: Your letters of the 11th ultimo (enclosing your bond) and of the 4th instant have been received. Until the commissary general (Samuel Carswell, esq.) shall have entered on the duties of his office, you will correspond with Benj. Mifflin, deputy commissary at Philadelphia, who will give you such information relative to clothing as may be necessary for your government. In the meantime you will make such purchases as General Dearborn may think advisable, for which purpose the sum of five thousand dollars will be remitted to you by the Treasurer of the United States.

Respectfully, your obedient servant,

W. EUSTIS.

JOHN LANGDON, Jr., Esq.,
Deputy Commissary, Portsmouth, N. H.

Vo. No. 1.

PORTSMOUTH, *December 11, 1812.*

\$11,653 91½

Value received, I promise to pay James Rundlet, esq., or order, eleven thousand six hundred and fifty-three dollars and ninety-one and a half cents, being the balance of his account for goods purchased for the use of the United States.

JOHN LANGDON,
Deputy Commissary.

Endorsed: March 1. Received four thousand dollars in part of the within.

\$4,000.

J. R.

July 26, 1813. Received of John Langdon, jr., esq., the balance of the within note, being seven thousand six hundred and fifty-three dollars and ninety-one and a half cents, principal, and three hundred and thirty-nine dollars and seventy cents, interest.

JAMES RUNDLET.

Vo. No. 2.

PORTSMOUTH, *July* 26, 1813.

Received of John Langdon, jr., deputy commissary, ninety-eight dollars and thirteen cents, for interest on money loaned him for the use of the government.

\$98 13.

JAMES RUNDLET.

Vo. No. 3.

PORTSMOUTH, *October* 15, 1812.

Mr. John Langdon, jr., Deputy Commissary, bought of H. & A. Ladd, 209 pieces Raven's duck at \$18..... \$3,762 00
(Pay within twenty days per agreement.)

Interest on the above from the time payment was due to

February 17, 1813, is 105 days..... 65 84

3,827 84

Received payment December 31, 1812, by his acceptance paid February 17, 1813,

HENRY & ALEX. LADD.

Interest not allowed in account.

Vo. No. 4.

\$2,306.

PORTSMOUTH, *January* 11, 1813.

Thirty days after date please pay to Samuel Chauncy, esq., or order, twenty-three hundred and six dollars, value received in duck and sheetings for use of the United States, which charge to account of

Your most obedient servants,

HENRY & ALEX. LADD.

Mr. JOHN LANGDON, jr.,

Deputy Commissary, Portsmouth, N. H.

Accepted, January 11, 1813.

JOHN LANGDON, Jr.

[Endorsed.]

Mr. John Langdon's acceptance due February 10-13. \$2,306.

March 3, 1813, received five hundred dollars.

April 17, 1813, received five hundred dollars.

July 21, 1813, thirteen hundred and six dollars, balance of principal, and forty-one dollars and forty cents interest, in full for the within draft, being in part payment for duck sold October 15, 1812.

HENRY & ALEX. LADD.

Vo. No. 5.

BOSTON, June 9, 1814.

I have received your letter of 8th instant containing check for thirty-six hundred and six dollars and forty-eight cents, for balance of your note of 22d March last for \$6,560 and interest, as per memorandum at foot. The note is enclosed.

With esteem,

WM. R. GRAY.

JOHN LANGDON, jr., Esq.,
U. S. Deputy Commissary, Portsmouth.

Amount of note.....		\$6,560 00
Interest to 8th June, 49 days,.....		53 57
		6,613 57
Endorsed.....	\$3,000 00	
Interest.....	7 12	
		3,007 12
		3,606 45

Interest \$53 57, \$7 12=\$60 69.

The note alluded to above was for Raven's sheeting, purchased on account of the United States.

Vo. No. 6.

\$508 65.

PORTSMOUTH, March 2, 1814.

Due Joshua Darling, esq., five hundred and eight dollars and sixty-five cents for stockings and socks received of him on account of the United States, and paid to him or order in ninety days at this office.

JOHN LANGDON, jr.,
Deputy Commissary.

Mr. Langdon offers to pay the above note, which offer he says he has repeatedly made, in treasury notes, with interest from the time they came into his possession, say March 21, 1815.

ALTEMA ROGERS.

[Endorsed.]

October 19, 1816. Received of Mr. John Langdon, jr., seventy-two dollars and sixty-four cents as interest due on this obligation, and which the said Darling is not to refund even if the government refuse payment to said Langdon.

JOSHUA DARLING.

Paid in current money.

Letter from Third Auditor to John Langdon, Jr.

TREASURY DEPARTMENT,
Third Auditor's Office, March 20, 1822.

SIR: I have received your letter of the 12th instant, enclosing an account for interest accruing on clothing supplied in the late war. The

decision of the former Secretary of War on claims for interest similar to yours, that in no case was interest to be allowed unless it had been incurred by his order and authorized by him, forbids the allowance of your claim. The papers are therefore returned to you.

Respectfully, your obedient servant,

PETER HAGNER, *Auditor.*

JOHN LANGDON, jr., Esq.,
Portsmouth, N. H.

Letter from J. Langdon, jr., to Secretary of War.

March 28, 1822.

SIR: I forwarded to Peter Hagner, esq., Third Auditor of the Treasury, on the 12th inst., an account against the United States for interest paid by me on purchases made in the Commissary department during the late war, and for money actually loaned to meet my contracts in that department, which I was compelled to do on account of not being placed in funds by government, which will appear obvious by referring to my account, exhibiting a constant balance to a large amount against the government; but notwithstanding the large balances due from government, which were in fact entitled to interest, I have not charged it in any case but where I actually paid it and took the requisite vouchers at the time, which I should have done more uniformly had I not expected that interest would have been allowed on liquidated balances, as the practice of our courts. The Auditor, in reply to my application, observes: "The decision of the former Secretary of War on claims for interest similar to yours, that in no case was interest allowed unless it had been incurred by his order and authorized by him, forbids the allowance of your claim." In reply to these remarks I would observe that I had at the time these claims accrued presented them for allowance, which were rejected upon the broad ground that the government did not allow interest. I have not produced them again without being supported by precedents of interest having been since allowed both in the Navy and War Departments; the cases no doubt are numerous. In the Navy Department it is not necessary that I should produce any; in the War Department large claims of that character have been allowed to the Commissary General of Purchases, and to Mr. Stetson, deputy commissary of Boston, without having acted under any specific instructions. Whether these were direct allowances, or by way of compromise, I am not prepared to say; but the fact that they had such claims, and that they were satisfied, is within my knowledge, as well as the circumstances leading to the payment of interest by them. And in my department a claim was made by Mr. Rundlet for interest on a contract through my department, which I was instructed to pay him. My engagements to pay interest were not expressly authorized by the War Department, but my purchases were, and not having been furnished with funds to meet the payments, was, in the cases charged in my account, bound to pay interest, which I did at the time of settlement, and took the requisite vouchers. In other cases it was absolutely

indispensable that I should have money for the purposes of my department, which in many instances was procured by me, and in one only did I take the precaution to obtain a voucher, not doubting but it would be allowed on account. I trust this explanation will induce you to authorize the allowance of my account, which, with the vouchers is in my possession, having been returned by Mr. Hagner, amounting to \$678 40.

I have the honor to be, &c.

Hon. J. C. CALHOUN,
Secretary of War, Washington.

J. Langdon to the Secretary of War.

PORTSMOUTH, May 7, 1822.

SIR: Although at the hazard of being considered importunate, I am constrained again to address you on the subject of my claim for interest during the late war. Under an indelible conviction of the justice of my claim and the obligation upon government to allow it, before I make a final appeal to Congress, which I feel it my duty to do should it be rejected by the War Department, I have ventured some remarks in reply to your letter on that subject of the 30th ult., which has been transmitted to me. Your objection appears to rest upon the conclusion that I was not authorized to purchase on a credit or without being actually placed in funds for the purchase of the identical articles. I presume this objection will yield to the consideration that the Commissary departments were authorized to purchase at discretion, either on credit or with cash, to answer such orders as were made upon them by the proper authorities for military supplies. The law establishing the commissary department requires of the deputy commissaries to purchase upon the order of the Secretary of War, the commissary general of purchases, commanding general, quartermaster general, or deputy quartermaster generals. These orders were in all cases given without any immediate supply or specific application of funds. If funds were not on hand (which was generally the case) an order must be delayed until a requisition could be made upon and answered by the War Department, which would in many cases operate greatly to the injury of the service; and should that course have been adopted, it must in the event have proved fatal to the service; and in this quarter of the Union, after the first year of the war, had purchases been suspended until funds were placed at the disposal of the purchasing department, the army could not have been kept together; and in the last year of the war it is a well known fact that the army depended more upon the credits obtained by the quartermaster and purchasing departments, and by the contractor for provisions, than from any supplies from the treasury. During the summer and fall of 1814 a large body of troops, amounting a considerable part of the time to more than four thousand men, were stationed at this post, and I was the only officer in the quartermaster's department. Barracks were to be built, and supplies of every kind imperatively demanded. Was I to

wait under those circumstances for funds? Had I done so the army must have been disbanded, as none were received until after the peace. It must be the case, then, that the purchasing departments had the discretion of making their purchases either for cash or upon credit, as the situation of their funds or their view of the public service should require; this was invariably the practice. When funds could not be calculated upon purchases, were commonly made payable on receipt of funds, but in some cases it was essential to agree upon a specific credit; and before the supplies from the treasury became so precarious, it was the usual course to agree upon a short credit, allowing time for the receipt of funds upon a requisition on the War Department. If funds were not received, the credit of the department renders it incumbent upon the presiding officer either to advance the money himself, procure it on loan, or to allow interest to the creditor; and the good faith of the government is as much pledged to remunerate the purchasing officer. Small indeed is the claim advanced by me on this ground. It should be much larger, which must be apparent to you, considering the large arrearages that were constantly due to my department. Small as it is, it is of importance to me that I should receive it, and I trust after more mature consideration it will not be withheld, more especially as other claims of a similar nature and much larger in amount have been allowed. I have endeavored to take a plain and concise view of this case, which I hope will not be considered in any way disrespectful, my sole object being to obtain what I consider justly my due.

I have the honor, &c.,

JOHN LANGDON, JR.

Hon. J C. CALHOUN,
Secretary of War, Washington.

J. F. Parrot to J. Langdon.

WASHINGTON, *March 4, 1823.*

DEAR SIR: After two interviews with the Secretary of War on your case, I addressed a letter to him giving a full statement thereof. On the 28th of February I received the answer, which I now forward to you, with the papers which you transmitted in your letter of the 18th January.

You have no other course but to petition Congress at the next session. I regret that nothing more favorable can be done.

With great regard, your friend and obedient servant,

JOHN F. PARROTT.

JOHN LANGDON, Esq.

W. Simmons to J. Langdon.

DEPARTMENT OF WAR,
Accounting Office, April 25, 1814.

SIR: I have received your letter of the 19th instant, accompanied by your account and vouchers for expenditures to 1st inst., which shall

be placed under examination and the result be made known to you. It may in the meantime be proper to apprise you that in consequence of a difference of opinion between the Secretary of War and the officers of the treasury as to the mode of ascertaining balances, none can be reported by me until a decision is had on the subject, and therefore any delay which may arise in paying the balance you claim may be accounted for by this circumstance.

Respectfully, your obedient servant,

W. SIMMONS.

JOHN LANGDON, jr., Esq.

W. Simmons to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, May 9, 1814.

SIR: Your accounts for the first quarter of the present year have been adjusted, and a balance found in your favor of \$83,704 16, being \$515 less than the amount you claim, as will fully appear from the enclosed statement of differences.

For reasons stated in my letter to you of the 25th ultimo, nothing further can be done by me in relation to this balance.

I am, sir, respectfully, your obedient servant,

W. SIMMONS.

JOHN LANGDON, jr., Esq.,

Deputy Commissary, Portsmouth, N. H.

Difference arising on settlement of the accounts of John Langdon, jr., for first quarter of 1814.

Balance claimed, per his statement.....	\$84,219 16
From which deduct—	
Amount claimed as commission for first quarter of 1814, suspended, his compensation to be settled annually.....	\$500
Amount overpaid A. R. Hall for services in public store, he having been settled with heretofore at \$15 per month instead of \$20 now charged.....	15
	515 00
Balance due him per official statement.....	83,704 16

Tobias Lear to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, September 8, 1814.

SIR: Your accounts for the second quarter of the present year, the receipt of which was acknowledged the 1st ult., have been adjusted, and a balance found in your favor of \$70,025 80, agreeing with your

own statement, which sum will be transmitted you by the Treasurer of the United States, to whom you will please to forward a receipt, and a duplicate to this office.

I am, sir, respectfully, your obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq.,
Portsmouth, N. H.

T. Lear to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, November 7, 1814.

SIR: Your accounts for the third quarter of the present year, the receipt of which was acknowledged the 4th inst., have been adjusted, and agreeably to your own statement an amount found due you of \$53,514 74, which the Treasurer of the United States will transmit you, and for which your duplicate receipts as usual will be required.

It is to the Secretary of War that application is to be made for funds.

I am, respectfully, sir, your obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR.,
Deputy Commissary, Portsmouth, N. H.

DEPARTMENT OF WAR,
Accountant's Office, February 21, 1815.

SIR: The foregoing letter was prepared to send to you at the time of its date; but as the Treasurer was not then prepared to make the remittance of the balance therein stated, it was withheld till this time, when he has receipted to this office for the warrant.

With great respect, I am, sir, your obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq.,
Deputy Commissary.

T. Lear to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, February 21, 1815.

SIR: The Treasurer of the United States will transmit you seventy-one thousand four hundred and eighty-five dollars and twenty-six cents, being amount of warrant No. 2076 issued by the Secretary of War on account of the following appropriations, viz:

Clothing.....	\$50,000 00
Camp equipage.....	20,000 00
Quartermaster's department.....	1,485 26
	71,485 26

For which sum you are held accountable. You will accordingly be pleased to forward a receipt to this office.

I am, respectfully, sir, your most obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq.,

Deputy Commissary, Portsmouth, N. H.

Treasurer of United States to J. Langdon.

TREASURY OF THE UNITED STATES,

Washington, February 21, 1815.

SIR: Enclosed you will find my draft, No. 221, on B. Austin, commissioner of loans, for \$125,000, the amount of warrants No. 1655 and 2076, issued by the Secretary of War, on receipt whereof be pleased to favor me with an early acknowledgment, specifying the sum received in treasury notes.

With due consideration, I am, sir, your obedient servant,

TH. T. TUCKER,

Treasurer of the United States.

JOHN LANGDON, JR., Esq.

The above was not received until March 21st, which was in treasury notes dated March 1st—the interest on which I have been required to answer for.

T. Lear to J. Langdon.

DEPARTMENT OF WAR,

Accountant's Office, February 22, 1815.

SIR: Your accounts for the fourth quarter of the last year, the receipt of which was acknowledged the 13th inst., have been adjusted and found correct, and after charging you with \$71,485 26, the amount of warrant 2,076 issued in your favor the 7th inst., a balance is found in favor of the United States of \$63,738 48, which you will please to credit in your next statement. Of this sum \$43,933 66 is on account of clothing, and \$19,804 82 on account of camp equipage.

I am, sir, respectfully, your obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq.,

Deputy Commissary, Portsmouth, N. H.

N. B. The amount of the warrant was not received until 21st of March, 1815. The warrant for \$76,025 80 was charged to me, but the amount not received, which, together with the warrant for \$71,485 26, also charged but not received, produce the above result, December 31, 1814.

T. Lear to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, March 8, 1815.

SIR: Your letter of the 28th ult. has been received.

Agreeably to the tenor of my letter of the 8th September last a balance was found in your favor on settlement of your accounts for the second quarter of the last year of \$76,025 80, for which sum a warrant issued, and which I find on inquiry is still in the hands of the Treasurer of the United States waiting the necessary arrangements to be made for remitting you the amount. This warrant being taken into view, would leave the result you speak of on settlement of your accounts to the 31st of December, provided you had been credited for your compensation for the last year, which was not done in consequence of your not charging it. It had better be introduced into your next statement.

I am, sir, respectfully, your obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq.,
Deputy Commissary, Portsmouth, N. H.

T. Lear to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, April 11, 1815.

SIR: I have received your letter of the 1st inst., and in reply have to inform you that your accounts for the last quarter had better be forwarded for adjustment. The interest accruing on the treasury notes should be particularly stated and credited by you. Any claims you may have for interest must be submitted to the Secretary of War.

Respectfully, your obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq.

T. Lear to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, July 3, 1815.

SIR: Your accounts for the first quarter of the present year, and your letter of the 20th May last, accompanying them, were duly received.

The Secretary of War having directed that warrant 1353 for \$70,025 80, issued in your favor the 9th September last, should be cancelled, it has accordingly been done, and on settlement of your accounts to the 31st of March last, a balance is found in your favor of \$36,143 03, which has been reported to the Secretary of War, and whenever the necessary arrangements are made by the Treasurer of the United States for remitting you that sum, you will be apprised of it.

The difference between the above balance and that claimed by you, is accounted for in the accompanying statement.

Although you have been charged with the interest you credit as having accrued on treasury notes while in your hands, it is necessary that a particular statement should be rendered showing the precise time each note was in your possession.

I am, sir, respectfully, your obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq.,

Dep'y Com'y, Portsmouth, N. H.

*Difference arising on settlement of the accounts of John Langdon, jr.,
to 31st March, 1815*

Balance claimed per his statement.....	\$36,588 40
Balance due him per official statement.....	36,143 03
Difference.....	445 37

Arising as follows :

Amount charged in his accounts for hospital departments to 31st March, 1815, No. 4, as Jacob Cutler's bill, no account rendered	444 76
Amount overcharged in the addition of his account, for stationery, wood, &c., and in entering J. Cutler's bill in it, Abs. F. V. 5.....	61
Difference.....	445 37

JULY 3, 1815.

T. Lear to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, July 28, 1815.

SIR: Your accounts for the second quarter of the present year, the receipts of which was acknowledged the 25th inst., have been adjusted, and a balance found in your favor of \$10,877 87, which has been reported to the Secretary of War, and will be transmitted to you by the Treasurer of the United States when arrangements can be made for that purpose.

For the difference between this balance and that claimed by you, I refer you to the enclosed statement. By it you will observe that a sum of \$233 40 has been deducted from the amount charged by you for compensation as a commission of $2\frac{1}{2}$ per cent. on your disbursements during the quarter, falls that much short of \$500.

You will also perceive that a deduction of \$3,017 87 $\frac{1}{2}$ has been made from the amount of J. Rundlet for cloth, that allowance, being viewed in the light of interest, cannot be admitted without the express sanction of the Secretary of War.

I am, sir, with respect, your obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq.,

Portsmouth, N. H.

Difference on settlement of the accounts of John Langdon, jr., deputy commissary, for 2d quarter of 1815.

Balance claimed per his statement.....	50,273	18
From which deduct so much of the above reported in his favor, on settlement of 3d July, 1815.....	36,143	03
Amount deducted from voucher 1, Abs. 1, amount of J. Rundlet, being for interest, which cannot be admitted without authority from the Secretary of War.....	3,018	87½
Amount overcharged for compensation, a commission of 2½ per cent. only allowed.....	233	40
	39,395	31
Balance due him, per official statement.....	\$10,877	87

JULY 28, 1815.

T. Lear to J. Langnon.

DEPARTMENT OF WAR,
Accountant's Office, August 23, 1815.

SIR: You will receive from the Treasurer United States forty-seven thousand and twenty dollars and ninety cents, being the amount found due you on settlement of your accounts to 30th June, 1815, viz:

Amount of warrant No. 2792; balance in your favor on adjustment of your accounts to 31st March, 1815, including your compensation to that period.....	36,143	03
Amount of warrant No. 2793; balance in your favor on adjustment of your accounts for 2d quarter of 1815.....	10,877	87
	\$47,020	90

You are accordingly requested to forward your receipts for the above amounts—one to the Treasury and one to this office.

I am respectfully, sir, your most obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq., *Dep,y Com.*

T. Lear to J. Langdon.

DEPARTMENT OF WAR,
Accountant's Office, March 12, 1816.

SIR: The Treasurer United States will transmit you twenty thousand dollars, being amount of warrant No. 3926, issued by the Secretary of War, the 9th inst., on account of Quartermaster's department, for which sum you are held accountable. You will accordingly be pleased to forward a receipt to this office.

I am, respectfully, sir, your most obedient servant,

TOBIAS LEAR.

JOHN LANGDON, JR., Esq., *Portsmouth, N. H.*

The Treasurer to J. Langdon.

TREASURY OF THE UNITED STATES,
Washington, March 12, 1816.

SIR: Enclosed you will find my draft, No. 487, on Joseph Nourse, Register, for \$20,000, the amount of warrant No. 3926, issued by the Secretary of War: on receipt whereof be pleased to favor me with an early acknowledgement, specifying the sum received in treasury notes.

With due consideration, I am, sir, your obedient servant,

TH. T. TUCKER,
Treasurer of the United States.

JOHN LANGDON, JR. Esq.

The Register to J. Langdon.

TREASURY DEPARTMENT,
Register's Office March 13, 1816.

SIR: I have remitted by this day's mail, in a package to your address, twenty thousand dollars in treasury notes, as described in the register herewith. After signing the receipt at the bottom of the register, and endorsing the Treasurer's order for the notes, you will transmit them both to this office.

I am, very respectfully, sir, your obedient servant,

JOSEPH NOURSE.

JOHN LANGDON, JR. Esq.,

The Register to J. Langdon

[Duplicate.]

TREASURY DEPARTMENT,
Register's Office, March 14, 1815.

SIR: I remitted by yesterday's mail, in a package to your address, twenty thousand dollars in treasury notes, as described in the register herewith. After signing the receipt at the bottom of the register, and endorsing the Treasurer's orders for the notes, you will please to transmit them both to this office.

I am, very respectfully, sir, your obedient servant,

JOSEPH NOURSE.

JOHN LANGDON, JR., Esq.

Gen. C. Irvine to J. Langdon.

COMMISSARY GENERAL'S OFFICE,
Philadelphia, October 14, 1815.

SIR: Your letter of the 9th is received. You had better purchase the sheet iron of a good quality at 12 cents per pound.

With regard to the cargo of the ship Lawrence, to be sold the 3d of November, if you can purchase blue cloth of good enough quality for coats, $\frac{5}{4}$ wide at a price not exceeding three dollars per yard, you had better do so at a credit of ninety days; and if you can purchase

on the same principle three-point blankets of good size and quality at \$3 25 and not exceeding \$3 50 each, do so. Purchase from five to ten thousand yards blue cloth and blankets not exceeding ten thousand.

Respectfully, I am, sir, your most obedient servant.

CALLENDER IRVINE.

JOHN LANGDON, JR., Esq.,
Deputy Commissary.

Gen. C. Irvine to J. Langdon.

COMMISSARY GENERAL'S OFFICE,
Philadelphia, November 25, 1814.

SIR: Your letter of the 20th is this moment received. Blankets are much wanted for the service; but we have not any funds, nor have I an assurance that we will be put in possession of funds shortly. I have some treasury notes; but these I must pay away at par with the interest accrued thereon up to the day. If you could buy at a credit of two months, perhaps funds may be obtained in that time; all I can say is, that the blankets are much wanted; but under existing circumstances I do not wish to give a positive direction to buy; you must be governed by your own judgment in the case.

Respectfully, sir, your obedient servant,

CALLENDER IRVINE.

JNO. LANGDON, Esq., Dep'y Com.

Gen. C. Irvine to J. Langdon.

COMMISSARY GENERAL'S OFFICE,
Philadelphia, August 17, 1815.

SIR: I have been informed that a considerable quantity of British goods, calculated for army clothing, is offered for sale at Portsmouth. If some of these goods can be procured on credit, say for sixty or ninety days or even a longer term, it will be well to secure them. Please inform yourself, and write me upon this subject.

Let the flannel shirts be made immediately.

Very respectfully, sir, your obedient servant,

CALLENDER IRVINE,
Commissary General, &c.

JOHN LANGDON, Esq., Deputy Commissary.

Gen. C. Irvine to J. Langdon.

COMMISSARY GENERAL'S OFFICE,
Philadelphia, November 24, 1814.

SIR: I enclose you an extract of a letter from the Secretary of War by which you will be governed in the issue of clothing for the accommodation of volunteers and militia.

Respectfully, sir, your obedient servant,

CALLENDER IRVINE,
Commissary General.

JOHN LANGDON, Esq., Deputy Commissary.

Extract of a letter from the Secretary of War, dated

“WAR DEPARTMENT, November 15, 1814.

“SIR: You will direct *your issuing commissaries*, that whenever, by the order of the commanding general, they are under the necessity of issuing clothing to the volunteers or militia, to report the quantity issued to the paymaster of the district, who will deduct the amount from the pay of each individual, respectively.

“I have the honor to be, sir, your obedient servant,

“JAMES MONROE.

“CALLENDER IRVINE,

“*Commissary General of Purchases.*”

Secretary of War to Committee on Claims.

WAR DEPARTMENT,
Washington, February 8, 1853.

SIR: I have the honor to transmit herewith “copies of all papers and documents” tending to show the true character of the claim of John Langdon, a commissary during the late war with England, in compliance with the request contained in your letter of the 27th ultimo.

Very respectfully, your obedient servant,

C. M. CONRAD,
Secretary of War.

Hon ALFRED P. EDGERTON,

Of the Committee of Claims, House of Reps.

J. Langdon to the Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., August 13, 1813.

SIR: I have the honor to transmit to you a summary statement of my purchases for the last month, a considerable part of which were received previously, but not paid for, from not having been provided with funds. It will be seen by referring to my accounts of the 30th June, forwarded to the accountant of the War Department, that the amount of the enclosed summary considerably exceeds the balance due to the United States from me at that time, which balance was occasioned by the amount of warrant No. 994, issued the last month, being charged to me in the adjustment of my accounts to the 1st of April last.

A further estimate, I conclude, will not be expected from me until the whole amount of my last has been remitted, although a much larger sum will be necessary to meet my engagements for the present quarter.

From a deficiency in funds I have been occasionally under the necessity of engaging to pay interest. Please to inform me if such engagements will not be allowed by the United States.

I have the honor to be, sir, very respectfully, your obedient servant,

JOHN LANGDON, JR.,
Deputy Commissary.

Hon. JNO. ARMSTRONG,

Secretary of War, Washington City.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from the 1st to the 31st July, 1813.

Articles.	Clothing department.	Total amount.
10,845 pairs shoes.....	\$10,628 10	
460½ yards black cloth.....	643 38	
15,968¾ yards Am. ¾ blue cloth.....	19,225 44	
36½ yards blue broadcloth.....	73 00	
598 coatings.....	1,096 33	
36,114¾ yards cotton shirtings.....	10,454 74	
1,008 yards cotton drilling.....	271 74½	
50 pieces India cottons.....	206 50	
6 pieces Colerain cotton for ruffling.....	72 50	
1 piece Colerain cotton for ruffling, 29 yards.....	10 87½	
44½ yards Cambric.....	24 34	
6 pieces long cloth.....	63 00	
415 pieces Russia sheetings.....	9,375 00	
		\$52,144 95
672½ yards cloth.....	145 26	
1,340½ yards white kersey.....	1,148 48	
42 pieces blue Nankin.....	126 00	
9 pieces and 87 yards blue shalloon.....	226 00	
59 pounds cotton yarn.....	39 53	
2,723 pairs half stockings.....	1,156 61	
389 pair socks.....	73 91	
Cord.....	14 40	
8 gross yellow binding.....	11 25	
300 infantry caps.....	252 00	
845 infantry plumes.....	134 82½	
		3,328 26½
74 red-top plumes.....	15 00	
554 cockades and eagles.....	44 32	
1,015 leather stocks.....	126 87½	
3,650 infantry cap plates.....	318 50	
260 artillery cap plates.....	65 00	
597¾ gross overall buttons.....	379 07	
50 gross artillery coat buttons.....	112 50	
59 gross vest buttons.....	59 00	
450 gross infantry coat buttons.....	450 00	
80 gross cavalry buttons.....	178 25	
		1,748 51½
12 drums, quartermaster's department.....		97 50
		57,319 23

NOTE.—The public storekeeper lately appointed not having received his instructions, such of the articles named in this return as have not been made into clothing or delivered, remain in my possession.

JOHN LANGDON, JR.

J. Langdon to General C. Irvine.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., August 25, 1813.

SIR: I have purchased 1,000 yards of flannel at 74½ cents per yard, which is the lowest price I could procure white flannel at. It is gen-

erally of a very good quality, sterling cost from 50 to 72 cents. The shirts will be completed in about ten days. A few more pieces will be required, which I shall procure.

I have not yet received the amount of my former estimate by about twenty thousand dollars, which I am much in want of. I have made an estimate at foot of the cost of the shirts, which you may transmit to the War Department or not, as you think best. Although a considerable sum over my former estimate is wanted, I have confined the present one to the flannel shirts for the reason above stated.

ESTIMATE.

2,000 flannel shirts, $3\frac{1}{2}$ yards each, is 6,500 yards at 75c.....	\$4,875
Making and thread, at 22c.....	440
	\$5,315

I have the honor to be, sir, your obedient servant,

JNO. LANGDON, JR.

Deputy Commissary.

Hon. CALLENDER IRVINE,

Commissary Gen. of Purchases, Philadelphia.

General C. Irvine to Secretary of War.

COMMISSARY GENERAL'S OFFICE,

Philadelphia, September 3, 1813.

SIR: John Langdon, jr., has been directed to provide 2,000 flannel shirts; his estimate amounts to \$5,315, and is enclosed. Please to cause that sum to be remitted to him.

I have also to request that the balance of requisitions from John Langdon, jr., and from J. H. Plummer, may be remitted them without loss of time, as I know the money is much wanted.

I will thank you to send me a few copies of the printed regulations; all I received are distributed. Please to send Robert E. Jennings a copy.

With great respect, I am, sir, your obedient,

CALLENDER IRVINE,

Commissary General.

Gen. JOHN ARMSTRONG,

Secretary of War.

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,

Portsmouth, N. H., September 6, 1813.

SIR: I have the honor to enclose a summary statement of my purchases for the month ending the 30th of August.

I have the honor to be, sir, very respectfully, your obedient servant,

JOHN LANGDON, JR.

Deputy Commissary.

Hon. JOHN ARMSTRONG,

Secretary of War, Washington.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from the 1st to the 31st of August, 1813.

Articles.	Clothing department.	Ordnance department.	Total amount.
693 pair knit socks -----	\$138 60		
3,518 yards shirting cotton -----	1,018 37		
1,300 leather stocks -----	162 50		
27 pair dragoon boots -----	108 00		
2,296 pairs shoes -----	2,250 80		
63 yards tow cloth -----	12 65		
223 pairs half stockings -----	106 35		
236 yards shalloun -----	144 00		
606 yards cotton and gurrahs for linings -----	191 00		
5,566 yards flannel for shirts -----	4,146 67		
1,246 yards blue $\frac{3}{4}$ cloth -----	1,538 58		
188 blankets -----	688 08		
2,118 cockades and eagles -----	170 00		
79 pounds cord -----	64 00		
620 white (infantry) plumes -----	107 20		
50 red top plumes -----	10 00		
	10,850 80		\$10,850 80
79 dozen priming wires and brushes -----			73 47
			10,924 27

General C. Irvine to Secretary of War.

COMMISSARY GENERAL'S OFFICE,
Philadelphia, September 13, 1813.

SIR: If any law has been enacted by Congress, making it the duty of the commissary general or of his deputies to comply with the requisitions of officers commanding, either regulars or militia, I will thank you for a transcript of the same, that both myself and deputies may be governed thereby.

With high respect, I am, sir, your most obedient servant,
CALLENDER IRVINE,
Commissary General.

Gen. JOHN ARMSTRONG,
Secretary of War.

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., October 30, 1813.

SIR: I have the honor to enclose you a summary statement of my purchases for the month ending the 30th ultimo.

I have the honor to be, sir, very respectfully, your obedient servant,
JOHN LANGDON, JR.,
Deputy Commissary.

Hon. JOHN ARMSTRONG,
Secretary of War, Washington.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from the 1st to the 30th September, 1813.

Articles purchased.	Clothing department.	Camp equipage department.	Total amount.
240½ yards $\frac{6}{4}$ Am. blue cloth -----	\$572 39		
126½ yards $\frac{3}{4}$ Am. blue cloth -----	168 00		
288 yards $\frac{3}{4}$ Am. black cloth -----	360 00		
8,213 yards shirting cotton -----	2,381 77		\$3,842 16
1,538 yards white kersey -----	1,461 10		
1,585 pairs half stockings -----	713 25		
300 leather stocks -----	39 00		
721 pairs socks -----	136 99		
1,066 pairs shoes -----	1,044 68		3,395 02
520 yards flannel -----	364 00		
295 epauletts -----	73 75		
154 yards tacel cloth -----	30 80		
305 infantry caps -----	256 20		
200 artillery caps -----	200 00		
1,995 plumes -----	498 75		1,423 50
24 drums -----		\$193 00	
1 fife -----		1 25	
81 camp kettles -----		111 50	
72 mess pans -----		43 20	359 95
			8,660 63

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., November 24, 1813.

SIR: I have the honor to enclose to you a summary statement of my purchases for the month ending the 30th of October.

I have the honor to be, sir, your most obedient servant,

JOHN LANGDON, Jr.,
Deputy Commissary.

Hon. JOHN ARMSTRONG,
Secretary of War, Washington.

A summary statement of purchases made by John Langdon, deputy commissary, from September 30 to October 30, 1813.

Articles.	Clothing department, and camp equipage.	Amount.
13,579 yards shirting cotton.....	\$3,937 91	
567 yards drilling cotton.....	198 45	
1,503 yards $\frac{3}{4}$ blue cloth.....	1,998 99	
134 $\frac{1}{4}$ yards $\frac{3}{4}$ blue cloth.....	338 95	
		\$6,474 30
331 $\frac{3}{4}$ yards white kersey.....	256 32	
120 yards blue duvant (facing).....	60 00	
86 yards duffils.....	157 67	
351 yards imported plains.....	35 50	
		509 49
200 artillery plumes.....	50 00	
1,448 pair of shoes.....	1,419 04	
1,504 infantry caps.....	1,263 36	
2,504 pair of stockings.....	1,126 80	
		3,859 20
150 yards $\frac{3}{4}$ black cloth.....	200 00	
2,429 leather stocks.....	303 62	
1,043 infantry plumes.....	177 31	
		680 93
27,600 pounds of sheet iron.....		3,204 00
		14,727 92

JOHN LANGDON, Jr.,
Deputy Commissary.

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., December 7, 1813.

SIR: I have the honor to enclose to you a summary statement of my purchases for the month ending November 30, 1813.

I have the honor to be, very respectfully, sir, your most obedient servant,

JOHN LANGDON, JR.,
Deputy Commissary.

Hon. JOHN ARMSTRONG,
Secretary of War, Washington.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from November 1st to 30th, 1813.

Articles.	Clothing department.	Amount.
962½ yards ¾ blue cloth, delivered on contracts.....	\$1, 195 29	
4, 537 pair of stockings.....do.....do.....	2, 041 65	
3, 732 yards of shirting.....do.....do.....	1, 082 28	\$4, 319 22
285¾ yards of blue ¾ cloth.do.....do.....	693 15	
4, 103 cockades and eagles..do.....do.....	328 20	1, 021 35
1 case containing 1,475 yards ruffling.....	722 75	
107½ yards of blue facing.....	45 15	
101½ pounds of cord.....	86 00	853 90
		6, 194 47

PORTSMOUTH, N. H., *December 7, 1813.*

JOHN LANGDON, Jr.,
Deputy Commissary.

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., January 22, 1814.

SIR: I have the honor to enclose to you a summary statement of my purchases for the month ending December 31, 1813.

I have the honor to be, very respectfully, sir, your obedient servant,

JOHN LANGDON, JR.,
Deputy Commissary.

Hon. JOHN ARMSTRONG,
Secretary of War, Washington.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from November 30 to December 31, 1814.

Articles purchased.	Clothing department, and camp equipage.	Amount.
3,344½ yards American made $\frac{3}{4}$ blue cloth.....	\$4,180 62	
77½ yards imported.....do.....	103 33	
96¾ yards American made $\frac{3}{4}$ blue cloth.....	260 25	
286 yards duffils.....	543 40	
5,366½ yards cotton shirting.....	1,556 14	
1,768 yards drilling.....	601 12	
141½ yards flannel.....	84 75	
4,606 pair of stockings.....	2,172 70	
10 bales lace and 200 yards Russia sheeting.....	4,800 00	
		\$14,202 14
127 mess pans.....		105 83
		14,308 14

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., February 15, 1814.

SIR: I have the honor to enclose to you a summary statement of the purchases made by me during the month ending January 31, 1814.

I have the honor to be, very respectfully, sir, your obedient servant,

JOHN LANGDON, JR.,

Deputy Commissary.

Hon. JOHN ARMSTRONG,
Secretary of War, Washington.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from the 1st to the 30th of January, 1814.

Articles.	Clothing department.	Amount.
40 pieces India cotton for shirtings.....	\$220 00	
10 pieces blue facing.....	30 00	
3,119 pair woollen stockings.....	1,403 55	
		\$1,653 55
150 gross buttons.....	112 50	
77 yards blue $\frac{3}{4}$ wide American cloth.....	102 67	
2,086¾ yards shirting cotton cloth.....	605 00	
		820 17
		2,473 72

J. Langdon to Secretary of War.

DEPUTY COMISSARY'S OFFICE,
Portsmouth, N. H. March 2, 1814.

SIR: I have the honor to transmit to you a summary statement of my purchases during the month ending February 28, 1814.

I have the honor to be, very resp'y, sir, your most ob't svt,

JNO. LANGDON, JR.,
Deputy Commissary.

Hon. JNO. ARMSTRONG,
Secretary of War, City of Washington.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from the 1st to the 28th February, 1814.

6,689	pair stockings.....	\$2,758	70	
9	pieces shirting.....	207	00	
2,139 $\frac{1}{4}$	yards shirting cotton.....	620	40	
				3,586 10
446 $\frac{3}{4}$	yards drilling cotton.....	158	69	
1,022	yards American manufactured flannel.	613	20	
12,926	yards imported flannel.....	10,340	80	
				11,112 69
1,611 $\frac{3}{4}$	yards American manufactured $\frac{3}{4}$ blue cloth.....	2,149	00	
3,150	yards imported blue cloth.....	3,826	41	
6,990 $\frac{1}{2}$	yards imported broadcloth.....	18,372	29	
2,238	blankets.....	10,071	00	
				34,418 70
				<u>\$49,117 49</u>

Gen. C. Irvine to Secretary of War.

PHILADELPHIA, April 5, 1814.

DEAR SIR: Your favor of the 2d instant is received. Stetson is providing clothing for the recruiting service in his district only, and under orders given him prior to the receipt of your hint.

Langdon had nearly completed the orders given him to provide clothing for the troops in service; that is 3,160 suits, and 1,800 suits for the recruiting service, and had procured or contracted for materials to furnish the balance before my countermanding order reached him.

This clothing, and those materials will have to be paid for, after which they will have little to do. I will increase the business here, at New York, and at Baltimore, if it can be done at the latter place.

Very truly yours,

CALLENDER IRVINE.

Gen. J. ARMSTRONG,
Secretary of War.

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., April 20, 1814.

SIR: I have the honor to transmit to you, enclosed, a summary statement of the purchases made by me during the month ending the 31st ultimo.

I have the honor to be, respectfully, sir, your most ob't servant,
 JNO. LANGDON, JR.,
Deputy Commissary of Purchases.

Hon. JOHN ARMSTRONG,
Secretary of War, Washington City.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from March 1 to 31, 1814.

Articles.	Clothing department.	Amount.
563 yards American manufactured broadcloth.....	\$1,463 80	
3,452 yards American manufactured single width cloth.....	4,487 60	
1,370 yards American manufactured black $\frac{3}{4}$ cloth.....	1,826 67	
256 yards American manufactured white kersey.....	229 40	
2,569 yards American manufactured flannel.....	1,541 40	
10,324 yards imported flannel.....	8,259 20	
		\$17,808 07
73 yards imported plains.....	85 41	
164 yards imported coatings.....	328 00	
317 yards beoking.....	152 16	
290 pieces Russia sheeting.....	6,960 00	
281 pieces India cotton.....	1,405 00	
		9,930 57
200 pieces blue cotton.....	1,000 00	
6,769 yards cotton shirting.....	2,166 00	
536 yards cotton drilling.....	187 60	
3,990 yards tow-cloth.....	997 50	
179 blankets.....	760 75	
869 epaulets.....	347 60	
12,501 pair men shoes.....	12,250 98	
		16,710 43
2,861 pair stockings.....	1,287 45	
6,869 pair socks.....	1,717 25	
200 artillery leather caps.....	400 00	
1,718 infantry leather caps.....	3,436 00	
577 artillery woollen pompons.....	86 55	
4,850 infantry woollen pompons.....	727 50	
		7,654 75
804 gross infantry coat buttons.....	683 40	
206 gross artillery coat buttons.....	463 50	
693 gross vest buttons.....	485 10	
476 gross overall buttons.....	190 40	
112 gross dragoon buttons.....	112 00	
		1,934 40
		54,038 22

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., May 7, 1814.

SIR: I have the honor to transmit to you, enclosed, a summary statement of the purchases made by me during the month ending April 30, 1814.

I have the honor to be, with great respect, sir, your ob't servant,
 JNO. LANGDON, JR.,
Deputy Commissary of Purchases.

Hon. JNO. ARMSTRONG,
Secretary of War, Washington City.

A summary statement of purchases made by John Langdon, jr., deputy commissary, from March 31, to April 30, 1814.

174 $\frac{1}{4}$ yards American manufactured $\frac{3}{4}$ black cloth.....contract...	\$217 89	
1,651 $\frac{1}{4}$ yards American manufactured $\frac{3}{4}$ gray cloth.....contract...	1,865 63	
114 yards American manufactured $\frac{6}{4}$ gray cloth.....contract...	256 50	
1,566 $\frac{1}{4}$ yards American manufactured $\frac{6}{4}$ blue cloth.....contract...	4,698 75	
969 $\frac{3}{4}$ yards American manufactured $\frac{3}{4}$ blue cloth.....contract...	1,260 68	
695 yards tow cloth.....do.....	139 00	
4,352 $\frac{3}{4}$ yards shirting cotton.....do.....	1,392 88	
		\$9,831 33
414 pair of stockings.....do.....	186 30	
13,170 pair socks.....do.....	3,292 50	
581 pair dragoon boots.....do.....	2,044 25	
8,188 pair men's shoes.....do.....	8,024 24	
3,165 leather caps, infantry.....do.....	6,330 00	
471 leather artillery caps.....do.....	942 00	
214 leather light dragoon.....do.....	535 00	
		21,354 29
		<u>31,185 62</u>

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., June 4, 1814.

SIR: I have the honor to transmit to you, enclosed, a summary statement of the purchases made by me within the month ending May 31, 1814.

I have the honor to be, very respectfully, sir, your most ob't servant,
 JNO. LANGDON, JR.,
Deputy Commissary of Purchases.

Hon. JOHN ARMSTRONG,
Secretary of War, Washington.

A summary statement of purchases made from April 30 to May 31, 1814, by John Langdon, jr., deputy commissary.

Articles.	Clothing department, and camp equipage.	Amount.
1, 151½ yards American manufactured 6¼ blue cloth, received on contracts.....	\$3, 454 50	
541½ yards American manufactured ¾ blue cloth, received on contracts.....	703 95	
38½ yards American manufactured ¾ black cloth, received on contracts.....	501 80	
2933¼ yards American manufactured grey ¾ kersey, received on contracts.....	3, 415 70	
676½ yards grey 6¼ kersey, received on contracts.....	1, 569 48	
11, 170 yards shirting cotton.....	3, 574 40	
		\$13, 219 83
99 pieces platillas for lining.....	1, 069 20	
24 pieces India cottons.....	144 00	
531 pair stockings.....received on contract.....	238 95	
4, 150 pair socks.....do.....do.....	996 00	
1, 181 leather stocks.....do.....do.....	92 80	
		2, 540 95
150 felling axes.....	225 00	
1, 332 canteens with straps.....	359 64	
128 tin mess pans.....	106 24	
		690 88
		16, 451 66

J. Langdon to Secretary of War.

DEPUTY COMMISSARY'S OFFICE,
Portsmouth, N. H., July 25, 1814.

SIR: I have the honor to enclose to you a summary statement of the purchases made by me during the month of June, 1814.

I have the honor to be, with great respect, sir, your ob't servant,
JOHN LANGDON, JR.,
Deputy Commissary of Purchases.

Hon. JOHN ARMSTRONG,
Secretary of War, Washington City.

A summary statement of articles purchased and received on contracts into the United States military store, at Portsmouth, N. H., during the month ending June 30, 1814.

95¼ yards Am. manufact'd black ¾ cloth.....	\$127 33
1,894 do.....do.....do.....black ¾ cloth.....	5,682 00
2,467½ do.....do.....do.....black ¾ cloth.....	3,701 25
6,533 do.....do.....do.....gray ¾ kerseys....	8,710 67
	<u>\$18,281 25</u>

602	yards American manufact'd grey $\frac{6}{4}$ kersey.	1,605	33	
123 $\frac{1}{4}$	do.....do.....white $\frac{3}{4}$ kerseys...	117	07	
1,522	do.....do.....white flannel.....	913	20	
6,205	do.....do.....shirting cottton..	1,985	60	
230	do.....do.....tow cloth.....	57	50	
				4,678 70
100	pieces ravens duck, camp equip. dept.....			1,800 00
420	pair stockings.....	189	00	
1,971	pair socks.....	492	75	
2,466	leather stocks.....	308	25	
3,030	infantry cap plates.....	363	60	
560	artillery cap plates.....	156	80	
				1,510 40
1,073	artillery cockades and eagles.....	107	30	
301	gross infantry coat buttons.....	255	85	
619	gross infantry vest buttons.....	278	55	
45	gross artillery vest buttons.....	56	25	
300	gross overall vest buttons.....	150	00	
				847 95
				<u>\$27,058 30</u>

Geo. Graham to J. Langdon.

DEPARTMENT OF WAR, *August 5, 1815.*

SIR: I am directed by the Acting Secretary of War to request that you would forward, without delay, to the Accountant of this department a statement of all the debts due by your department, designating the individuals to whom they are due, and arranging them under the several heads of appropriation. It is also indispensably necessary that your accounts should be settled up; to enable you to do this, you will return to the Accountant the vouchers for all partial payments, or advances on contracts; and whenever this shall be done, money will be immediately placed in your hands to discharge all claims against your department; at least, so far as the treasury can supply current money at, and the appropriations will justify.

The appropriations, it is believed, will be adequate to the discharge of all the claims against your department, except those for the ordnance and hospital departments; and measures have been taken to supply them. Your prompt attention to this business is requested.

I have the honor to be, very respectfully, your ob't servant,
 GEORGE GRAHAM, *Chief Clerk.*

JOHN LANGDON, Esq.,
Deputy Commissary of Purchases.

Geo. Graham to J. Langdon.

DEPARTMENT OF WAR, *October 21, 1815.*

SIR: The enclosed letter from Mr. Cushing, respecting a claim on your department, is referred to. Thirty-five thousand dollars have been remitted to General Ripley to discharge the old claims on the Quartermaster's department within his military department.

I have the honor to be, very respectfully, your ob't servant,
 GEORGE GRAHAM, *Chief Clerk.*

JOHN LANGDON, Esq.,
Portsmouth, New Hampshire.

J. Langdon to Geo. Graham.

PORTSMOUTH, *October 26, 1815.*

SIR: Your letter of the 21st instant I have this day the honor to acknowledge the receipt of, enclosing a letter from Mr. Cushing to the Secretary of War. In the summer of 1814 I undertook the duty of the Quartermaster's department for this post, by request of Mr. Eustis and General Dearborn; under my direction quarters were provided and supplies furnished to the troops stationed here, amounting during the fall to about four thousand men, the disbursements including the repairs of fortifications, officers, transportation, &c., amounted to about \$33,000. The accounts and vouchers were forwarded by me to Mr. Eustis, and repeated applications made to him for funds, which I was assured when I undertook the duties of that department would be immediately placed in my hands. Not one dollar has been received, by which means I am personally very greatly embarrassed, and individuals of whom I obtained the supplies much injured; of this number Mr. Cushing is one, he having committed a great error in mentioning me in my character as deputy commissary. I have also a letter this day from Mr. Eustis, saying that General Ripley has in his hands \$10,000 for the demands in this quarter. It would be a great inconvenience to me to receive so small a part of the amount due here. People have waited so long that everyone would consider himself equally entitled to pay. Will you have the goodness to submit the subject of this letter to the Secretary of War, that means may be put into my hands for the settlement of the demands in question?

I have the honor to be, very respectfully, your ob't servant,
 JOHN LANGDON, JR.

GEO. GRAHAM, Esq.,
War Department, City of Washington.

J. Langdon to the Secretary of War.

PORTSMOUTH, *November 16, 1815.*

SIR: Jacob Eustis, esq., assistant deputy quartermaster general for military district No. 1, having appointed me to act in the Quartermaster's department at this post, disbursements were made under or-

ders of General Dearborn and General Chandler, for the supply and accommodation of the troops stationed here during the last two quarters of the year 1814, and until the 31st of August, 1815, to the amount of \$35,600. Of this sum ten thousand two hundred dollars have been received by me from General Ripley, in treasury notes, bearing date 21st October, leaving a balance of \$25,400, required to close the accounts of the Quartermaster's department at this post to the 31st August, 1815, inclusive; which sum I take the liberty to request that you would please to direct to be placed in my hands for that purpose.

I have the honor to be, with perfect respect, your most ob't servant,
JOHN LANGDON, JR.

Hon. W. H. CRAWFORD,
Secretary of War, City of Washington.

I approve this requisition.

EL. W. RIPLEY,
Maj. Gen. Commanding 2d Department.

J. Langdon to Secretary of War.

PORTSMOUTH, N. H., *February 21, 1816.*

SIR: I had the honor on the 16th of November last of forwarding to you a requisition, approved by General Ripley, for funds necessary to meet the demands against the Quartermaster's department at this post up to the 31st August last, a very large proportion of which has been due more than one year. As cash was expected in every instance, particularly for supplies furnished the army (about 4,000 men) stationed here in the fall of 1814, the creditors have sustained a very essential injury in remaining so long a time unpaid, and are now very pressing in their applications. Permit me to request your attention to this subject, and to hope that funds will be immediately forwarded agreeable to my requisition herein referred to.

I have the honor to be, with the most perfect respect, your ob't serv't,
JOHN LANGDON, JR.

Hon. WILLIAM H. CRAWFORD,
Secretary of War, Washington.

Geo. Graham to J. Langdon.

DEPARTMENT OF WAR, *March 9, 1816.*

SIR: A warrant has been issued in your favor for twenty thousand dollars, the amount of which will be remitted to you in treasury notes, to be applied to the discharge of the claims against the Quartermaster's department. The claims will be discharged without delay, and your accounts immediately returned to the Accountant of this department. If the amount now remitted is not sufficient to discharge all the claims, you will report to the Accountant such claims as shall re-

main unpaid, specifying the nature of the claim, the amount, and the name of the claimant.

You will pay due attention to the enclosed communication from the Hon. Mr. Hale.

I have the honor to be, very respectfully, your ob't servant,
 GEORGE GRAHAM, *Chief Clerk.*

JOHN LANGDON, Jr., Esq.,
Portsmouth, New Hampshire.

Secretary of War to John Langdon.

WAR DEPARTMENT, *April 9, 1822.*

SIR : I have received your letter of the 28th ultimo, on the subject of interest.

I cannot authorize the allowance of any amount for interest paid, unless the expense was incurred by order of this department.

Very respectfully, your obedient servant,

J. C. CALHOUN.

JOHN LANGDON, Esq.,
Portsmouth, New Hampshire.

A. Stetson to J. W. Langdon.

BOSTON, *December 10, 1822.*

DEAR SIR: I am yet without pay or advantage for the services rendered the government in time of the late war; the interest paid on moneys advanced and losses sustained on treasury notes with which I was paid specie advances, took from me all government allowed for the purchases made. Failing to obtain indemnity from the War Department, I have petitioned Congress for redress.

Have you been allowed interest where you advanced money, indemnity for loss on treasury notes, or been paid for services rendered, other than those of a deputy commissary of purchases? and what has been allowed you for purchases?

If, sir, you will have the goodness to answer these inquiries by return of mail, or so soon afterwards as with convenience you can, giving me the amount of interest paid to you, and indemnity allowed for loss on treasury notes, you will very much oblige me, as I want all the precedents I can obtain to enforce my claim; and I want, also, the amount which has been allowed to you for extra services, or for services rendered other than those of purchasing commissary, and what those services are which have been compensated. I contend that when we had paid for the supplies purchased and rendered the necessary accounts, the duty was done for which the compensation of deputy commissary was provided for by law, and that by law we were entitled to a commisson of two and a half per cent. on our purchases, unless the percentage exceeded \$2,000 a year for the time we were in office. That the drawing out of materials which had been bought and delivered to

the storekeeper, making the clothing and preparing materials for the use of the army, the superintending the public stores, taking care of the public property, and making of the issues, were no more enjoined by law on the deputy commissaries of purchase than on other officers. That the percentage was never intended to compensate for such services.

I find by the late newspapers, the commissary at Pittsburg, Mr. Foster, in an action brought against him by government, has recovered his claim for moneys advanced, loss on treasury notes, and pay as special issuing commissary, which items correspond with those of which my claim is formed. I have written to Mr. Foster to transmit to me a statement of his case and claim.

I have also required of the government to make up my pay for purchases to the \$2,000 per annum, the accountant having, for the last part of the time, reduced it to what the percentage for the time amounted to, while the percentage on my purchases for the first two years of the war would have yielded eight or ten thousand dollars per annum.

Any other information within your reach which will favor a just issue to my claim, will be thankfully received by your friend and humble servant,

AMASA STETSON.

Hon. JOHN W. LANGDON,

Late U. S. Deputy Commissary of Purchases.

A. Stetson to John Langdon.

Boston, September 22, 1824.

DEAR SIR: Your letter of the 21st ultimo has been received, and would have been earlier answered but for my absence and indisposition.

The items of my claim allowed by Congress were, first, moneys advanced as interest on loans obtained for account of government; second, interest on a warrant which was issued in my favor for a balance found due to me on settlement, from the time issued until it was paid; and, thirdly, an inconsiderable sum in payment for services rendered, other than those which as purchasing commissary it was my duty to perform, together amounting to about half the sum claimed, and not more than a third of the amount which, in justice, I was entitled to.

That you may succeed in obtaining justice better than I have been yet able to do, is the wish of your friend and humble servant,

AMASA STETSON.

J. LANGDON, Esq.

P. S. Your Mr. Bartlett and Governor Bell, to whom I feel much indebted, will understand this business; in them you will find able advocates, so far as you satisfy them your claim is well founded.

S. Bell to J. Langdon.

CHESTER, *May* 29, 1826.

SIR : Soon after my arrival at Washington in December last, I called at the War Department on the subject of your claim upon the government, and found that no disposition existed to depart in the smallest degree from the principles before applied to your demand. Nothing, therefore, remains to be done but to apply to Congress by petition. I cannot speak confidently as to the result of such application, but think it may be advisable to make the attempt whenever you can find it convenient for you to be at Washington. Several claims of a character in some respects similar to yours were presented at the late session, but no decision was had upon them. These applications will be renewed at the next session, and the principles which will be adopted in relation to them will become the rule for deciding upon future applications.

I am, very respectfully, your obedient servant,

SAMUEL BELL.

Hon. JOHN LANGDON.

S. Bell to J. Langdon.

WASHINGTON, *December* 25, 1832.

DEAR SIR: I have had the papers mentioned in your letter with me at every previous session of Congress since I received them. I did not bring them with me at this session from a conviction that the great mass of business left unfinished at the last session, with the shortness of the present, and the very important subjects of a public nature which would be brought before us, must preclude all probability of acting definitely upon your claim.

By presenting the subject at an early stage of the next session, a decision may be had upon it.

Very respectfully, your obedient servant,

SAMUEL BELL.

S. Bell to J. Langdon.

CHESTER, *December* 26, 1836.

DEAR SIR: Agreeably to the request in your letter of the 20th inst., I enclose the papers relative to your claim on the government formerly committed to my care, and hope you may succeed in obtaining justice from a rich if not a grateful country.

With sentiments of respect and esteem, your obedient servant,

SAMUEL BELL.

Hon. JOHN LANGDON.

Third Auditor to Committee on Claims.

TREASURY DEPARTMENT,
Third Auditor's Office, January 17, 1854.

SIR: I have the honor to state, that on the 20th of January, 1853, the account and letters of John Langdon in reference to his claims growing out of the discharge of his duties as deputy commissary of purchases at Portsmouth, New Hampshire, during the last war with Great Britain, were transmitted to this office by the Hon. R. J. Bowie, chairman of the Committee on Claims, of the House of Representatives, with a request for a report upon the facts alleged by Mr. Langdon.

In the letter which accompanied these papers it is stated that "the committee would, at the same time, be pleased to receive any suggestion in regard to the extent of said claims, if based upon the following general principles, which seem to have governed in other similar cases :

"1st. Interest on money advanced by him for the use of the United States.

"2d. Commission on amount of money borrowed or advanced on his own security for the use of the United States at the rate allowed in analogous cases.

"3d. Compensation for services in quartermaster's or other branch of the public service not within the scope of his proper duty as commissary of purchases.

"4th. An allowance for superintending and issuing clothing or other supplies not embraced in his legitimate duty as purchasing commissary.

"5th. Loss on treasury notes paid to him on treasury warrants in lieu of specie or other par funds advanced by him for the use and benefit of the United States.

"6th. Commission at the usual rate upon supplies purchased by him, for which, if any, the bills were rendered to the War Department as unpaid for the want of funds in his hands, but subsequently paid at the department."

A report having been requested by Mr. Richard Burgess, in relation to this case, I have the honor to inquire whether the committee now desire information on the points indicated on the preceding page, and to state that such a report as is required will be prepared with as little delay as may be consistent with due attention to the other urgent business now before the office.

With great respect, your most obedient servant,

F. BURT, *Auditor.*

Hon. A. P. EDGERTON,

Chairman of the Committee of Claims, H. R.

Third Auditor's Report.

TREASURY DEPARTMENT,
Third Auditor's Office, April 4, 1854.

SIR : On the 21st of January, 1853, a letter was received by my predecessor in this office from the Hon. Richard J. Bowie, chairman of the Committee on Claims of the House of Representatives, dated on the preceding day, with numerous accompanying papers.

After mentioning that the account and letters of John Langdon, in reference to his claims growing out of the discharge of his duties as deputy commissary of purchases at Portsmouth, New Hampshire, during the last war with Great Britain, have been referred to the Committee of Claims, his letter proceeds to inform me that the same are transmitted to this office "for a report upon the facts alleged by Mr. Langdon;" and that "the committee would, at the same time, be pleased to receive any suggestion from me in regard to the extent of claims, if based upon the following general principles, which seem to have governed in other similar cases :

"1st. Interest on money advanced by him for the use of the United States.

"2d Commission on amount of money borrowed, or advanced on his own security, for the use of the United States at the rate allowed in analogous cases.

"3d. Compensation for services in quartermaster's or other branch of public service not within the scope of his proper duty as commissary of purchases.

"4th. An allowance for superintending and issuing clothing or other supplies not embraced in his legitimate duty as purchasing commissary.

"5th. Loss on treasury notes paid to him on treasury warrants in lieu of specie or other par funds advanced by him for the use and benefit of the United States.

"6th. Commission at the usual rate upon supplies purchased by him, for which, if any, the bills were rendered to the War Department as unpaid for the want of funds in his hands, but subsequently paid at the War Department.

It is deemed proper, if not necessary, to premise on the subject, that before the establishment of the office of the Third Auditor, on the 3d March, 1817, all accounts of the War Department had to be examined and settled by the accountant and additional accountant of that department; and had, after the settlement thereof, to be filed for preservation in the office of the Register of the Treasury.

Subsequent to the establishment of the office of the Third Auditor, it became, by law, the depository of all accounts audited and settled in it; and the duty of auditing and settling all outstanding accounts of the War Department, originating prior to the 1st of July, 1815, devolved upon the Third Auditor. In the investigation after the 3d March, 1817, of claims and accounts so originating, it frequently became requisite to have recourse to the accounts and vouchers of disbursing officers on duty during the war with Great Britain, which had

been settled and filed away in the office of the Register of the Treasury, as aforesaid ; and, as occasion demanded, many of them were borrowed for use in the office of the Third Auditor, and remained in it at the time the Treasury building was burnt, and thus escaped destruction, although the settled accounts and vouchers, generally, of the War Department, were then consumed.

Amongst the number thus saved, accounts and vouchers of Mr. Langdon, relating to his transactions during the 3d and 4th quarters of 1812, and 1st quarter of 1813, which formed the basis of the first and second settlements with him, have been found ; but those rendered by him connected with *eleven* subsequent settlements are all missing, and were doubtless destroyed at the conflagration before alluded to.

Under circumstance like these, such information as the office might still possess pertinent to the call you have made upon it, could be discovered only by very extensive and tedious searches, both in its money and correspondence records and files, and in congressional documents ; and the accountant by whom these searches were to have been prosecuted, and this report to have been prepared, had charge of a distinct branch of the duties of the office, demanding all his time, and unavoidably subjecting him to continual interruptions. Hence it was impracticable to have the report prepared before the adjournment of Congress on the 3d of March, 1853. Then came on a change of the administration, and of the head of this bureau, and a complete reorganization of the entire establishment, about and under which every one attached to it was laboriously engaged during the ensuing summer and fall. In December, 1853, the accountant having charge of this case died, after a long illness of more than two months, in which this office, and, I may add, the public service, sustained a severe loss ; for he was an officer of remarkable ability, industry, and integrity, added to an experience of almost forty years. In fact, it was not until some time after his death that I was aware at all of Mr. Bowie's request for a report upon the claim ; and Mr. Gunton's duties having necessarily devolved upon an accountant of far less experience, taken from another division of the office, and subject to the same interruptions as his predecessor, has unavoidable caused the delay in complying with a similar request contained in your letter of the 19th January last.

The papers transmitted with your letter consist of an account of Mr. Langdon, with unauthenticated copies of vouchers as to sundry payments of interest ; a letter from him to the Hon. C. W. Peaslee, dated February 25, 1852 ; a copy of a letter from Mr. Langdon to Judge Talmadge, dated November, 1844 ; four letters from Callender Irvine, commissary general, to Mr. Langdon, respectively dated August 17, 1813, October 14, 1813, November 24, 1814, and 25th November, 1814 ; two letters from Amasa Stetson to Mr. Langdon, severally dated December 10, 1822, and September 22, 1824 ; three letters from the Hon. Samuel Bell to Mr. Langdon, dated, severally, May 29, 1826, December 25, 1832, and December 26, 1836 ; copies of sundry letters appearing to have been written by the accountants of the War Department on the 9th May, 1814, 8th September, 1814, 7th

November, 1815, 22d February, 1815, 8th March, 1815, 21st March, 1815, 11th April, 1815, 3d July, 1815, 28th July, 1815, and 23d August, 1815, to Mr. Langdon, as to settlements of his accounts; and a copy of a letter from the Treasurer of the United States, dated 21st February, 1815, to Mr. Langdon, as to an enclosed draft on the commissioner of loans, for \$125,000, receivable in Treasury notes.

In the account of Mr. Langdon, the United States are debited to him as follows :

1813.

July 23. To interest paid Jas. Rundlet, vouchers Nos. 1 and 2.....	\$437 83	
To interest paid H. & A. Ladd, vouchers Nos. 3 and 4.....	107 24	
June 9. To interest paid W. R. Gray, voucher No. 5.....	60 69	

1816.

Oct. 21. To interest paid Jno. Darling, voucher No. 6	72 64	
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1814.

Mar. 31. To interest on \$83,704, from date to May 26, 56 days, being the balance of his account first quarter 1814, per voucher No. 11.....	770 57	
To interest on the balance, \$33,704, to June 30, 68 days.....	376 74	
		\$678 40

To interest on \$76,025 80, per adjustment of his accounts 2d quarter 1814, for which a warrant was issued, and which remained unpaid to the 21st March, 1815, when the warrant was withdrawn and a new one issued, which was paid in Treasury notes, then at a discount of 15 per cent., and received by him at the above date, 264 days, per vouchers Nos. 1, 2, 3, and 5....	3,299 95	
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To interest on \$53,514 74, balance of his accounts 3d quarter 1814, per adjustment, for which a warrant was issued as above; no remittance received until March 21, 1815, as above, 172 days, vouchers Nos. 4 and 5.....	1,513 07	
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To interest on \$7,746 78, balance per adjustment of his accounts 4th quarter 1814, vouchers Nos. 2 and 7.	114 61	
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Mar. 31. To interest on \$36,143, per adjustment of accounts 1st quarter 1815, to September 30, 6 months, vouchers Nos. 6 and 12.....	1,084 29	
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1814

June 30. To interest on \$10,877 87, per adjustment 2d quarter 1815 to October 25, 117 days, voucher No. 8... \$209 21
\$6,221 13

To 3 years' services as issuing commissary, observing that the duties of the quartermaster's department, so far as regards transportation, were performed by him two years previous to his appointment as assistant deputy quartermaster general without any compensation—adding that he claims the pay of issuing commissary, which has been allowed to Mr. Stetson, deputy commissary, of Boston, and Mr. Tracy, of Connecticut—he charges \$1,200 per annum, they pay of commissary of issues, 3 years..... 3,600 00

1816.

Jan. 1. To his compensation as deputy commissary of purchases, from March 31st, to date, (3 quarters of a year,) the commission upon his purchases, as prescribed by law, having exceeded \$2,000 per annum during his term of office, but during the last three quarters amounting to only \$304 83, the sum allowed him—the law allowing 2½ per cent. on purchases not to exceed \$2,000 per annum, during the term of office 1,500 00
 Deduct amount allowed..... 304 83
1,195 17

Credit:

August. Sum allowed as interest on James Rundlet's contract, included in the above statement..... 3,018 87
9,823 14

At foot of the account Mr. Langdon has stated that he also claims interest on interest paid by him as per vouchers from time of payment; upon interest on warrants issued by the Secretary of War, whilst suspended, for want of funds; also on the interest upon all other liquidated balances, from the time of settlement of his accounts, and upon additional compensation considered as due on the settlement of his accounts.

1st Class of Charges for Interest.

For much information having an important bearing on these generally, permit me to refer you to the report made by my predecessor on the 15th February, 1844, as to the claim preferred by the before named James Rundlet, and to the report of the Committee of Claims of the *Senate* in relation thereto, both of which are printed and may be seen in the volume containing Document No. 258, 1st Session, 28th Congress.

And it may be well here to invite attention to that part of the statement of Mr. Rundlet, commencing on the bottom line of page 6 of the document, wherein he has declared that "it was the *practice* of Mr. Langdon, the deputy commissary of purchases, to send to my store almost daily for whatever he wanted in the clothing line, and at the expiration of a few weeks or months, or *whenever he wanted to make a requisition for funds, to get my accounts in duplicate receipted, and send them on to the War Department, giving me his note or due-bill for the amount;*" and to observe, that if the accountant of the War Department had known of such a practice on the part of Mr. Langdon as is here disclosed, no settlements could, without a violation of the rules, have been made of his accounts, nor, consequently, could balances have been declared as *due to him*. The destruction of the chief of his accounts and vouchers render any ascertainment in this office of the whole extent of his dealings with Mr. Rundlet impracticable; but the papers on which the latter founded his charges for interest, as described in the aforesaid document, and wherein the *balances* only are specified, evince that such dealings must have been very large in amount; and they indicate, too, that *no interest* was payable unless allowed by the United States. The practice adverted to is, besides, not shown to have been limited to transactions with Mr. Rundlet; nor is it manifested that the purchases of him and others, on credit, by Mr. Langdon, were not made at prices, in the fixing of which the sellers took into consideration the risk of the delay in procuring payments for them.

Information with regard to purchases on credit, and to the want of funds, appears to have been communicated to Mr. Langdon in the before mentioned letters from the Commissary General; and Mr. Langdon is shown to have been early apprised by the accountant of the War Department that no charges for interest would be allowable.

The preceding remarks are intended to apply to the interest charges generally. Notice will now be taken of them in detail.

Charge of \$437 83, per vouchers 1 and 2.

Voucher No. 1 purports to be a copy of a promissory note given by Mr. Langdon on the 11th of December, 1812, to Mr. Rundlet, for \$11,653 91½, "the balance of his account for goods purchased for use of the United States," no time of payment mentioned therein; copies of receipts appear on the back, one for \$4,000, dated March 1st, and the other for the balance of \$7,653 91½ and for \$339 70 interest, dated 26th July, 1813. Voucher No. 2 purports to be a receipt of

the latter date, from Mr. Rundlet, for \$98 13, expressed to be "for interest on money loaned him (Mr. Langdon) for use of government."

Charge of \$107 24, per vouchers 3 and 4.

Voucher 3 appears to be a copy of an account of H. & A. Ladd, dated October 15, 1812, against Mr. Langdon, as deputy commissary, for 209 pieces of ravens duck, amounting to \$3,762, whereon is remarked, "payment within twenty days per agreement;" at the foot is a receipt thus: "Received payment December 31, 1812, by his acceptance, payable February 17, 1813." In this account interest is charged 20 days from October 15, 1812, to February 17, 1813, 105 days, amounting to \$6,584. Voucher 4 appears to be a copy of an order dated January 11, 1813, of H. & A. Ladd on Mr. Langdon as deputy commissary, in favor of Samuel Chauncy for \$2,306, for value received in *duck and sheeting* for the use of the United States. Upon this is endorsed payments of \$500, each on March 5 and April 7, 1813, and on the 21st of July of the same year a final payment of \$1,306 principal, and \$41 40 for interest, the draft being in part pay for duck sold October 15, 1812.

Charge of \$60 69, per voucher 5.

Which is a receipt in favor of Mr. Langdon as deputy commissary, dated June 9, 1814, for \$3,606 45, by William R Gray, expressed to be for balance of the note of the former, dated March 22, 1814, for Russia sheetings purchased on account of the United States, including \$60 69 for interest.

Charge of \$72 64, per voucher 6.

Which is a copy of a due-bill of Mr. Langdon to Joshua Darling, dated March 2, 1814, for \$508 65, for stockings and socks received of him on account of the United States, and payable to him or order ninety days thereafter, to which is the following "Note: Mr. L. offers to pay the above note, which offer *he says* he has repeatedly made in treasury notes, with interest after the time they came into his possession, say March 21, 1815.

JOSHUA DARLING.

"Received of John Langdon, jr., seventy-two dollars and fourteen cents, as interest due on this obligation, and which the said Darling is not to refund, even if the government refuses payment to said Langdon.

JOSHUA DARLING.

From the correspondence records of Accountant of the War Department preserved in this office, it appears that on settlement of Mr. Langdon's accounts for the *2d quarter of 1813*, he was informed that charges for interest paid were a *second time deducted*, so that at an early period he was aware that he had no authority to bind the United States for the payment of interest on his purchases or disbursements, and that such charges would not be passed to his credit on the settlement of his accounts.

From June 1812, when he commenced the performance of his duties

as deputy commissary of purchases until the final settlement of his accounts as such in 1817, as appears by an examination of his accounts made prior to their being burnt in 1833, the *only charges made by him for interest* were the following :

For interest on H. & A. Ladd's bill for sixty pieces of duck, for 105 days.....	\$23 00
For ditto on H. & A. Ladd's, for 209 pieces of duck, for 105 days.....	65 84
	\$88 94

Instead of the \$107 24, now claimed, and no attempt appears to be made to account for the discrepancy ; nor is there any proof that the papers upon which the charges are founded are true copies from the original. Also, for interest due J. Rundlet on contract with him for cloth 3,018 87

The rule established by the Secretary of War in such cases, by repeated decisions, was, that "*no account* for interest would be allowed unless the expense was incurred by order of the War Department," and under it, as before remarked, all the above items were disallowed.

Subsequently, however, upon another application, the Secretary of War, on the 7th of May, 1817, allowed the item of \$3,018 87 due J. Rundlet, not as interest in the sense of the items due H. & A. Ladd, but because in two contracts entered into by Mr. Langdon with J. Rundlet on the 26th of February and 10th of March, 1814, for the purchase on account of the United States of a large quantity of blue cloth and kerseys, it is stipulated "*that if funds are not furnished within thirty days from the delivery of the cloth, there shall be as much added to the price of the cloth as shall amount to the interest for the time payment is delayed after thirty days from the delivery of the cloth ;*" and the Secretary's decision was, that "Mr. Rundlet should be paid agreeably to the contract." Mr. Langdon was accordingly allowed this item in the settlement of his accounts on the 13th of May, 1817, and the money was remitted to him by the Treasurer of the United States.

Mr. Langdon's accounts were finally settled in November, 1817, and from none of the letters, papers, or accounts, now within reach of examination, does it appear that up to that time he had any other claim for interest on the United States. In the absence of any satisfactory explanation, his present charge of \$437 83 for interest paid J. Rundlet appears to me to be irreconcilable with the fact of his early presentation and constant prosecution of, until paid, of the item of \$3,018 87 for what he charged as interest paid to the same man, J. Rundlet, upon a similar transaction. Nothing further appears to have been heard of his claim for interest until the 12th of March, 1822, on which day he appears to have enclosed his present claim to the late Third Auditor, Peter Hagner, esq., for allowance and payment. On the 25th of the same month, the receipt of the claim was acknowledged, in which it was described as "*an account for interest*

accruing on clothing supplied in the late war," and he was informed that "the decision of the former Secretary of War on claims for interest similar to his, that in no case was interest to be allowed, unless it had been incurred by his order and authorized by him, forbade the allowance of his claim, and the papers were therefore returned."

On the 28th of the same month Mr. Langdon appears again to have applied to the Hon. J. C. Calhoun, the Secretary of War, for the allowance of this same interest, and his written appeal at considerable length is remarkable for its point and vigor; but the Secretary, notwithstanding, on the 9th of April, 1822, addressed Mr. Langdon at Portsmouth, N. H., the following, refusing to allow it, to wit:

SIR: I have received your letter of the 28th ultimo on the subject of interest. I cannot authorize the allowance of any account for interest paid, unless the expenses were incurred by order of the Department.
J. C. C."

The claim was again presented to Mr. Calhoun on the 23d day of the same month by the Hon. Wm. Plummer, jr., of the House of Representatives, and again disallowed by the Secretary on the 30th, his decision being as follows:

"In this case the distinction between the authority of the War Department required, before an allowance can be made, and that supposed already to exist, by the fact that the accounts and vouchers of Mr. Langdon have been allowed, on which the interest is charged, consists in this: That authority is wanting in Mr. Langdon to purchase the identical articles on a credit, or without having the funds in his hands, and authorizing the allowance, consequently, of interest; as no such authority is produced, the claim cannot be allowed. J. C. C."

It would appear, then, that no more than \$88 94, the amount received by H. & A. Ladd, on account of their bill for the purchase of duck, was paid by Mr. Langdon for interest, before he became officially aware that it would not be allowed in the settlement of his accounts at the Treasury, and any equitable consideration favorable to an allowance to him of this amount, would not apply to the subsequent items presented for the first time years after the final settlement of his accounts.

2d Class of Charges for Interest.

These are for interest upon the balances reported to have been found due him by the accounting officers of the Treasury on settlement of his accounts for the 1st, 2d, 3d, and 4th quarters of 1814, and the 1st and 2d quarters of 1815, to periods when it is alleged the amounts were remitted him by the Treasury, and the vouchers are copies of official letters of the accountants, advising him of the settlements, and one of the Treasurer covering a remittance of 125,000 dollars. The interest thus claimed amounts altogether to \$6,221 13. It appears, however, that he has left out of view the instances where the balances were against him, as will be seen by the following statement made up from the records; the first accounts rendered by him being for the 3d and part of the 4th quarters of 1812.

Statement showing the dates of receipt and settlement of the accounts of John Langdon, jr., Deputy Commissary of Purchases, and the balances found due to him and the United States, respectively.

1812.	
3d and part of 4th quarter.—Received, December 16, 1812, and returned for correction; again received January 13, 1813, and settled January 27, 1813. Due him and transmitted	\$6,510 75
Part of 4th quarter 1812, and 1st quarter 1813.—Received, June 22, 1813, and settled July 23, 1813. Due United States	\$82,412 96
1813.	
2d quarter.—Received August 16th, and settled Aug. 19, 1813.—Due United States	49,623 94
3d quarter.—Received October 31st, and settled Nov. 2d, 1813.—Due him.....	8,379 44
3th quarter.—Received January 27th, and settled Feb'y 15, 1814.—Due United States	23,280 31
1814.	
1st quarter.—Received April 25th, and settled May 9, 1814.—Due him.....	83,704 16
This balance could not then be transmitted to him in consequence of a difference of opinion between the Secretaries of Treasury and War.	
2d quarter.—Received August 1st and settled Sept. 8, 1814.—Due him, but not transmitted until 6th March, 1815, the original warrant first issued therefor having been cancelled.....	76,025 80
3d quarter.—Received November 4th and settled Nov. 7, 1814.—Due him, but not remitted until Feb. 12, 1815...	53,514 74
4th quarter.—Received February 14th and settled Feb'y 22, 1815.—Due United States	63,738 48
1815.	
1st quarter.—Received about June 1st and settled July 3, 1815.—Due him.....	36,143 03
2d quarter.—Received July 25th and settled July 28, 1815.—Due him.....	10,877 87
Both the last balances remitted to him August 23, 1815.	
3d quarter.—Received October 23d and settled Oct. 24, 1815.—Balance due him, which was remitted October 30, 1815.....	387 19

Accounts as deputy assistant quartermaster general.

From Aug. 1814, to Aug. 1816.—Received July 12th and settled July 25, 1816.—Due United States.....

3,175 75

\$275,542 98 222,231 44

Accounts and vouchers for old claims.

Received Jan'y 27th and settled May 13, 1817.—Due him \$2,740 06, which was paid him on next day.

In this settlement he was allowed the \$3,018 87 heretofore mentioned on account of the cloth contract with James Rundlet.

He was also allowed \$797 81, being commission of $2\frac{1}{2}$ per cent. on disbursements of \$31,912 29, in full compensation for all disbursements.

By the foregoing it will be observed the remarkable promptitude with which Mr. Langdon's accounts, after their reception, were settled at the treasury. He was bound to have transmitted them within a reasonable time after the end of each quarter, and for any unnecessary delay the United States is surely not responsible to him in the shape of interest upon balances apparently in his favor. The rule, if admitted, should work both ways, and the interest be charged as well upon balances in favor as against the government. But such a rule has never applied in transactions between the government and its disbursing officers, rendering their accounts quarterly, and it is believed that not a single case of the kind can be pointed out—an actual balance can never be found in favor of such an officer, except where his personal compensation is charged in his accounts, and then only to that amount, or where he advances his private means and uses them for the use of the government. In this case Mr. Langdon's compensation never exceeded five hundred dollars per quarter, and there is no proof whatever of any such use of his private means, nor among any of the books and papers is there any indication to be found that he entertained such a claim for interest as the present, until the year 1822. As a general rule, the United States never pay interest except by special contract, or in cases where it is provided for by special legislation, and its disbursing officers are not allowed nor required to go beyond the funds advanced to them by the proper department. But the true cause of the balances in Mr. Langdon's favor is explained by himself, and by one of his witnesses, Mr. James Rundlet.

Mr. Rundlet says elsewhere, "that it was the *practice* of Mr. Langdon to send to my store almost daily for whatever he wanted in the clothing line, and at the expiration of a *few weeks or months*, or *when-ever he wanted to make a requisition for funds*, to get my accounts *in duplicate receipted*, and send them on to the War Department, giving me his note or due-billⁿ for the amount." And the explanation is made clear, and the practice proven by the following due-bill of Mr. Langdon, agreeing in every particular with those described by Mr. Rundlet:

"\$45,159 22.

"DEPUTY COMMISSARY'S OFFICE,
"Portsmouth, March 31, 1814.

"Due James Rundlet, esq., forty-five thousand one hundred and fifty-nine dollars and twenty-two cents, being the balance of an *account settled* with him this day, for goods purchased of him on *account* of the *United States*, for which I have received his *duplicate receipts*, and which is payable to him or his order at this office when *funds* are *furnished therefor by the United States*.

"JOHN LANGDON, Jr.,
"Deputy Commissary."

It will be observed that the heaviest balance in Mr. Langdon's favor was declared on settlement of his accounts for the 1st quarter of 1814, on the 9th of May of that year, in which more than half consisted of receipted accounts, of the above amount, not one dollar of which had been paid by him, when through ignorance they were passed to his credit by the accountant; nor was he bound nor did he pay them, until *afterwards, when funds for that purpose were furnished* by the United States.

On the 9th and 28th of May, 1814, \$100,000, in two warrants of \$50,000 each, were furnished him, out of which, there is very little doubt, the following payments, endorsed on the foregoing due-bill, were made:

"May 26, 1814. Received twenty-five thousand dollars, in part of the within.

"June 11, 1814. Received twenty thousand one hundred and fifty-nine dollars and twenty-two cents, in full for the principal of the within, leaving the *claim for interest* on the government to be adjusted hereafter.

"20,159 22.

"JAMES RUNDLET."

So that if there was any claim for interest arising out of this transaction, it was not in Mr. Langdon, but in James Rundlet, and *did in fact form a part* of the claim of the latter for interest, which was effectually put at rest by the report thereon of the Hon. Mr. Wright, before referred to.

By an examination of that report, the other balances found due Mr. Langdon are accounted for, and the interest, if any, claimed by Mr. Rundlet, in like manner. On the 30th of June, 1814, by another due-bill, Mr. Langdon admitted there was due James Rundlet \$26,325 40, for goods delivered at the military store, payable to him or order, on *receipt of funds from the government*. It appears that this sum was paid on the 21st March, 1815, and that the due-bill was left with Mr. Rundlet as evidence of *his claim* on the government for *interest*. On the 30th September, 1814, and on the 31st March, 1815, there was a like admission to be due Mr. Rundlet, of \$40,977 95, (paid March 21, 1815,) and \$18,338 06½, (paid 30th September, 1815,) payable upon the same terms and conditions, to wit: when funds should be received from government, the due-bills being also left with Mr. Rundlet, as evidence of his claim for interest; and finally, on the 1st of July, 1815, there appears to have been another similar due bill for

\$12,450 87, paid 30th September, 1815, more than two months after the settlement of Mr. Langdon's accounts for the 2d quarter of 1815, when a balance was declared to be in his favor of \$10,877 87, upon which Mr. Rundlet also founded another item of *his claim* for interest. From all this it appears to me perfectly clear that the balances found due Mr. Langdon did not arise from advances of his own private funds for the use of government, even if he had the authority to do so, but upon accounts for supplies receipted in his favor in advance of actual payment, under express stipulations that such payments should not be demanded until funds for that purpose were furnished by the government, and that interest, if any, should *enure* to the *parties furnishing the supplies*.

Charges for services as issuing commissary for three years,	
at \$1,200 per annum.....	\$3,600 00
And for compensation as deputy commissary of purchases	
from 31st March, 1815, to 1st January, 1816, at \$2,000	
per annum, less \$304 83, already received	1,195 17

The first item is claimed upon the ground of a similar allowance having been granted by Congress to Amasa Stetson, at Boston, and Mr. Tracy, of Connecticut. The second is founded upon the alleged fact that his commission of $2\frac{1}{2}$ per cent. upon his disbursements during his entire service would have averaged \$2,000 per annum, whilst the sum (\$304 83) actually paid him, was the amount of said commission on disbursements within the period therein indicated.

John Langdon, jr., was appointed a deputy commissary of purchases at Portsmouth, New Hampshire, on the 4th of June, 1812, under the 4th section of the act of the 28th of March of the same year, and was disbanded on the 30th of June, 1815. His duties are described in the 5th section, to be under the direction of the commissary general of purchases, or in cases of necessity, the commanding general, quartermaster general, or deputy quartermaster, to purchase all the arms, military stores, clothing, and generally all articles of supply requisite for the military service of the United States. By the 7th section it is declared that the compensation of the deputy commissary shall not exceed two and one half per centum on the public moneys disbursed by him, nor in any instance the sum of two thousand dollars per annum; and by the 2d section of the same act, the compensation of an *assistant deputy quartermaster* is fixed at forty dollars per month, three rations per day, and forage for one horse, equal in money to about \$795 per annum, exclusive of quarters. The duties of the deputy commissaries of purchases were modified and more clearly defined by the 5th section of the act of 3d of March, 1813, which directs that the Secretary of War prescribe the species as well as the amount of supplies to be purchased respectively by the commissary and quartermaster general's departments, and the respective duties and powers of said departments respecting such purchases.

Mr. Langdon appears to have entered upon the discharge of his duties soon after his appointment, as the first remittance to him was a warrant for \$5,000, on the 10th of July, 1812. His disbursements were mainly on account of clothing, but they also included the quartermaster department, camp equipage, and contingencies, for which,

as has been heretofore shown, he rendered his accounts regularly, up to and including the second quarter of 1815. After this period, it would seem, his subsequent disbursements were on account of bills previously contracted, for the payment of which funds had not been provided at the time. During all this time he charged his commission upon all his disbursements as was paid as follows :

From June 11 to December 31, 1812, at \$2,000 per annum, his commissions equalling or exceeding that sum..	\$1,109 89
From January 1 to March 31, 1813, at same rate.....	500 00
From April 1 to June 30, 1813, at same rate.....	500 00
From July 1 to September 30, at same rate.....	500 00
From October 1 to December 31, at same rate.....	500 00
From January 1, 1814, to March 31, 1815,.....	2,500 00
From March 31 to June 30, 1815, commissions on his disbursements which did not amount to \$2,000 per annum..	276 60
Within the same period he received an allowance for clerk hire and stationery, amounting to.....	619 53

Afterwards, on the final settlement of his accounts in November, 1817, upon special decision of the Secretary of War, he received the following additional allowances as compensation for his disbursements in the quartermaster department, to wit :

2½ per cent. commission on disbursement of \$1,775 06, prior to the 31st of March, 1815...	\$44 37	
And 5 per cent. commission on disbursement of \$30,543 64, subsequent to 31st of March, 1815.	1,527 18	
	<u>1,571 55</u>	
Total received.....		<u>8,077 57</u>

To show what Mr. Langdon considered himself entitled to, as additional compensation, in November, 1817, when his accounts were settled, and the two last items allowed him, the following is a copy of his claim as then presented by him :

" UNITED STATES to JOHN LANGDON, Jr.,		DR.
" 1816.		
" June 19. To my services as <i>asst. d. q. m. genl.</i> , from Dec. 19, 1813, to this date, is 30 months, at \$40 per month.....	\$1,200 00	
" To 2,736 rations, at 20 cents.....	\$547 20	
" To 32½ cords of wood, being the allowance to a d. q. m. genl., at \$6 per cord.....	195 00	
" To quarters for two and a half years, at \$70 per year.....	175 00	
	<u>917 20</u>	
		<u>2,117 20</u>

“SUPRA, CR.

“ By this sum allowed me as compensa- tion at $2\frac{1}{2}$ per ct. upon the amount of my accounts.....	\$797 11	
“ Balance claimed by Jno. Langdon, jr	1,320 09	
		2,117 20

“E. E.

JOHN LANGDON, JR.

“PORTSMOUTH, *November*, 1817.”

As before mentioned, Mr. Langdon was paid upon this claim \$1,571 55 in the shape of increased commission on his disbursements, leaving only \$545 65 that was not allowed of all that he at that time demanded as his due.

In transmitting this account to the Secretary of War, in a letter dated October 14, 1817, he says: “As officers of the Quartermaster’s department were allowed their pay and emoluments until a final settlement of their accounts, I consider myself entitled at least to the pay of an assistant deputy quartermaster general from December, 1813, to the receipt of funds in May, 1816, which enabled *me to discharge the bulk of the accounts*, which I will call two years and a half, allowing a reasonable time to make up the accounts; strictly, I should be entitled to pay to a final settlement. I have enclosed an account with this letter for two years and a half pay, which I flatter myself, after this information, you will direct to be paid.

“In making this application, I would not be considered as soliciting an indulgence, but merely what my services entitle me to. In such a case I feel assured that I shall not appeal in vain to the justice of government.

“I have the honor to be, with the most perfect respect, your obedient servant,

“JOHN LANGDON, JR.”

“GEO. GRAHAM, Esq., *Acting Secretary of War.*”

Mr. Langdon’s second charge for compensation as deputy commissary of purchases, from 31st of March, 1815, to 1st of January, 1816, is not stated in accordance with the facts disclosed in this investigation. His commission as such ceased on the 30th of June, 1815, and he was paid what his commission of $2\frac{1}{2}$ per cent. on his disbursements amounted to within that year, as provided for in the law of his appointment.

I think, however, it is nothing but sheer justice to Mr. Langdon to say, that from all the evidence in this office it appears that he was an officer of uncommon ability and zeal for the public service during the whole period of his connexion with it. His accounts were well made out, rendered regularly, and were subject to few suspensions or disallowance for any cause, and these when made known were promptly corrected.

He faithfully accounted for all moneys and property in his hands belonging to the government without delay or difficulty, and without the loss of a dollar.

Letters are found on file of the years 1816 and 1817 from General John Chandler and Lieutenant Colonel (now the venerable general) J. B. Walbach, speaking in the highest terms of Mr. Langdon as an officer, and declaring that but for his strenuous exertions in the discharge of the duties of his office at one time, the militia could not have been kept at their respective stations.

By the act of May 5, 1824, Mr. Amasa Stetson, deputy commissary of purchases at Boston, Massachusetts, was allowed and paid, in addition to what he had previously received, as follows :

For interest actually paid by him on purchases for the United States.....	\$2,081 49
For services as issuing commissary for three years and one and a third months.....	3,613 67
And an item, the purport of which cannot be found with the papers, amounting to.....	514 84
Total.....	<u>\$6,215 10</u>

That part of his claim for "*depreciation in treasury notes,*" and for "*additional compensation for services as deputy commissary,*" was disallowed.

Final charge, but amounts not stated.

1st. Of interest on *interest* paid by him as per vouchers.

2d. Of interest on warrants issued by the Secretary of War, whilst suspended for want of funds.

3d. Of interest on the interest upon all the other liquidated balances from the time of settlement of his accounts, &c.

4th. Of interest upon additional compensation considered as due on the settlement of his accounts.

The second item is considered to be merged and included in the third, and the interest claimed upon the other three, carrying the calculation up to the first of January, 1854, if allowed, would amount as follows :

Upon the first item of \$678,40, the sum of.....	\$1,629 36
Upon the third item of \$,621,13, the sum of.....	17,156 90
Upon the fourth item of \$4,795,17 the sum of.....	11,640 98
	<u>29,827 24</u>
Deduct interest on \$3,018,87, credited as received for interest on James Rundlet's contract included in the above from May 14, 1817, when paid, to January 1st, 1854...	6,635 37
	<u>23,191 87</u>
To which add principal of claim.....	9,823 14
Whole amount claimed.....	<u>\$33,115 01</u>

With respect to this part of the interest claim, I have simply to repeat the remark in a former part of this report upon the same subject,

that the rule of the government is never to pay interest, except by express contract, or legislation in special cases, being always ready to pay any demand which it recognizes to be due. Far less tenable is the claim for compound interest, upon balances accruing like those in Mr. Langdon's favor, accumulating through a long lapse of years, without any notice on his part of the existence of such a demand.

I think I have answered you upon all the points indicated in Mr. Bowie's letter, as far as I have had the means of doing so, except the fifth, which is as to "loss on treasury notes paid to him on treasury warrants in lieu of specie or other par funds advanced by him for the use and benefit of the United States."

Although mentioned in Mr. Langdon's account against the United States, I do not understand him as making any distinct or separate claim for any such loss. The rule of reimbursement for such losses is where the notes were received under assurances of indemnity from the head of the department, and clear proof of the actual amount of loss. As neither of these conditions have been attempted to be answered by Mr. Langdon, it is fairly to be presumed that any claim he may have entertained on account of losses on treasury notes, has been abandoned.

As requested, the papers received are herewith returned.

I am, with great respect, your obedient servant,

F. BURT, *Third Auditor.*

Hon. A. P. EDGERTON,

Chairman of the Committee on Claims, House of Reps.

J. Langdon to C. W. Peaslee.

BUFFALO, *February 25, 1852.*

DEAR SIR: Mr. Jewett, of the Commercial, informed me that he had a conversation with you on the subject of an old claim which I have against the government, accruing during the war of 1812. I feel greatly obliged to you for this, as well as for other manifestations of the interest you feel in my welfare. Mr. Jewett also was kind enough to proffer the service of himself and friends so far as they could be in any way available, for which favors I should have made earlier acknowledgments, and prepared to avail himself of your kindness, but for a lingering illness, which has confined me to my house from the early part of winter to the present time; and I am now only in a state of convalescence, and obliged to address you through an amanuensis, my daughter, Mrs. Northrop.

After satisfying myself that nothing was to be obtained through the War Department, these claims were put into the hands of Governor Bell; he considered the claim perfectly just and equitable, but as Mr. Amasa Stetson, who held a similar office, that of deputy commissary general of purchases at Boston, and who had a similar claim upon a larger scale, had petitioned Congress, and was in attendance for several sessions, Governor Bell considered it best to wait the result of his efforts. Mr. Stetson at length succeeded, as he informed me, in ob-

taining a most meagre and unsatisfactory allowance. In the meantime, a bill was introduced to appoint a board of commissioners to adjust and settle all outstanding claims upon the United States, without reference to Congress, which subject has been lingering ever since. Governor Bell considered it important that I should be in Washington to insure success; but I was a considerable part of that time absent from the United States, which of course rendered it impossible for me to be at Washington during the remainder of Governor Bell's term in the Senate. Subsequently the late Judge Talmadge undertook the claims, and after having made a scrutinizing investigation, he assured me that there was no difficulty in the way of their recovery, and had he survived, I think he would have succeeded in obtaining them. Again they were brought forward under the patronage of Mr. Spaulding, member of Congress. I understand from him that he petitioned Congress, and that the subject was referred to the Committee on Claims. The paper he says may be found on the files of that committee. Our old friend, the late Governor Hill, who voluntarily tendered his services, was fully acquainted with the claims and had no doubt but they could be recovered, but he considered that I should also put in a claim for losses on treasury notes, in which cash payments to the amount of several hundred thousand dollars were paid when the lowest rate of discount was fifteen per cent. The following duplicate vouchers accompanied the accounts: voucher No. 1 to 12, May 26, 1826; December 26, 1826; December 26, 1836. Two from Amasa Stetson, Callender Irvine, commissary general of purchases, November 25, 1814; October 13, 1813; November 24, 1814; August 17, 1813. Statements prepared for Judge Talmadge, to which I request your particular reference, as explanatory of the nature of the claim. I am not able to review and compare the accounts with documents on hand, but I presume they are correct. I hope shortly to be able to write you more particularly on this subject, and in the meantime must request you to adopt such measures as your judgment may suggest. I shall be greatly obliged if you can spare an hour in the midst of the pressure of public business to inform me if the papers are found on the file of the office of the Committee on Claims, of which I understand you think is the prospect of final success.

Please present the love of uncle, aunt, and cousins to Mrs. Peaslee, and receive for yourself our most sincere and affectionate regards.

Respectfully yours,

JOHN LANGDON.

Hon. C. W. PEASLEE.

P. S.—Please say to Mrs. Peaslee that “cousin Elizabeth” wishes particularly to be remembered, and hopes that some of the agreeable chances and changes of life may bring us together again, and give me the pleasure of an acquaintance with my new cousin.

IN THE COURT OF CLAIMS.

THOMAS B. KING vs. THE UNITED STATES.

Brief for petitioner.

The claim for pilotage is to be found in the several schedules annexed to the petition, and marked schedules A, B, C, D.

Schedule A shows the amount due for piloting vessels in and out belonging to the government of the United States from June 1, 1847, to August, 1847, to be \$396.

This amount is established by the certificates of Major Eastland, (quartermaster,) and payment was refused on the ground that he had given notice that no piloting would be paid unless the service was rendered on written authority from the quartermaster, and this had never been given.

Schedule B shows the account due for pilotage where the service was refused by government vessels spoken by said King, certificates of service having been refused by order of said Eastland, between June 1, 1847, and October 31, 1848, to be \$5,638 50, being half pilotage, as provided by the act of Texas.

Schedule C shows the amount of pilotage on vessels piloted and towed in and out by United States steamers, on the order of said Eastland, between June 1, 1837, and October 31, 1848, to be \$5,415.

Schedule D shows the amount of pilotage on government vessels which were piloted in and out by petitioner between November 1, 1848, and December 1, 1850, to be \$2,014 50.

The last account is certified to by quartermaster Chapman, (p. 36.) The depositions were taken in this case by an agreement with the Solicitor, which will be found at p. 86. The above schedules were submitted to the witnesses, and are proved by them.

John Graham testifies that he was in the employ of the quartermaster the whole time the account accrued, and that he knows it "to be true and correct." (p. 66)

Joel L. Fukins testifies that he knows it to be correct; that he resided since 1846 at Point Isabel and Brazos Santiago, and that from 1846 to 1854 King was the branch pilot. (p. 67.)

S. E. Langdon testifies that he was a justice of the peace for precinct No. 1 in Nueces county, which precinct is now in Cameron, having been separated from it; that he believes the claim to be a just one; and that the services set forth were faithfully performed. (p. 68.)

E. M. Anderson testifies that he knows that the petitioner "piloted all the government vessels in and out of the harbor from the winter of 1848-'9 up to 1852; that he was then in command of a government steamer, and knew that King had good and efficient boats and men, and believes that he is entitled to remuneration for services rendered that have never been paid for." (p. 69.)

Henry Parker testifies, that between 1846 and 1853, he was towed in and out "perhaps not less than twenty times by the government tow-boats Anson and Monmouth without a pilot." That when he wished to go out, Eastland, the quartermaster, gave him a written

permit, "for which on each occasion I was required to pay him the sum of \$20." The form as follows: "Tow schooner + Star to sea." He further testifies that he knows that "a great number of vessels" were towed into the harbor by the government steamers. (p. 70.)

William L. Sawyer testifies that between the spring of 1847 and the fall of 1849, when Eastland was acting as quartermaster, he constantly employed government steamboats in towing vessels in and out, for which he demanded compensation; that the witness, whenever towed in or out, himself paid \$20, except on one occasion; that when he commanded the Franklin he was charged \$80 for towing her in. In answer to the 6th interrogatory, the witness then describes the various vessels he had commanded—five in number—which entered the harbor; and in answer to the 7th interrogatory, he describes the number of times that each crossed the bar, on all of which occasions the said vessels were towed by the government steamer by order of Eastland. In answer to the 8th interrogatory, he gives the names of 45 vessels recollected by him that were trading at Brazos during that period. And further, that he knows that most of these vessels were private, and most, if not all, were towed in by government steamers. (p. 73.)

Daniel Phillips testifies that he knew King was acting as pilot from December, 1846, to September, 1847, and that during that time a large number of vessels were towed in and out by government steamers without a regular pilot on board. Witness describes the case of the Merchant, and the suit by King against her for pilotage; that an officer had been placed on board by the magistrate to detain her until the suit was adjudicated, and that Eastland went with an armed force and took her out of the custody of the officer, &c. (p. 74.)

George W. Parker testifies that King piloted the government schooner Sarah twice while under his command; that he did not pay for it; that Eastland told him no pilotage was to be paid; that he did not know of any other regular pilot than King. (p. 77.)

Ambrose Crane testifies that he was acting as military storekeeper when King was pilot, that is, from 1847 to 1852; that he knew a large number of vessels were towed in and out, during that time, by government steamers having no regularly commissioned pilot on board; that King was well provided with pilot boats, and was prompt and energetic in the discharge of his duties. He further says, in answer to the interrogatory referring to Exhibit D: "I know that King piloted government vessels into and out of said harbor during the period mentioned." (p. 78.)

William H. Talbot testifies that the schooner St. Paul, in 1847, and the schooner Lincoln, in 1848, were towed in by government steamers; that he paid Eastland \$20 each way for each of them, and that on one occasion he paid Eastland \$120 for towing the Lincoln in and out. (p. 80.)

Robert J. Roberts testifies, that he knew King, as pilot, from 1846; that he was always diligent and attentive; that he was well provided with boats; and that he and his assistants were constantly in the habit of speaking vessels outside and offering their services. When-

ever vessels appeared off the bar, King's boats were always outside ready to pilot them. (p. 81.)

John S. Rhea testifies, that he was collector of the port from May, 1849, to May, 1853, and that, to the best of his recollection, King piloted all the government vessels during this period up to the time the said vessels were sold. (p. 82.)

These depositions fully establish the account as set forth in the schedules A, B, C, D. The commission to King, from the governor of Texas, bears date 23d November, 1846. (p. 85.)

The payment of the sums demanded in schedule A, B, C is resisted on the ground that the department did not recognize the right of any pilot commissioned by the governor of Texas. That during the war the government had steamers, the masters of which acted as pilots. That this portion of Texas was held as a conquered country by the United States forces under military law, and that Texas had no legal right to exercise any civil jurisdiction over it, or to the commission pilots. (Major Thomas, 88, 90.)

To the same effect General Jesup :

“The government of Texas had no doubt authority to grant the commission to Mr. King of branch pilot at Brazos Santiago, but that commission, from the circumstances attending the admission of Texas into the Union, remained in abeyance in the conquered territory during the continuance of the war. The territory over which she could exercise authority extended only so far on the side of Mexico as she had conquered and had been able to hold when she was admitted into the Union. Her jurisdiction did not extend with the conquest of the territory, for she had given authority to the United States to settle her boundary to the west. Until the ratification of the treaty of peace, the right to the whole territory was not complete in Texas, and until that time King's commission was in abeyance.” (p. 91.)

Whatever was the true boundary of the original *province* of Texas, while it was held as part of Louisiana, or subsequently as one of the States of Mexico, on which much has been written and spoken by diplomats and politicians, it is certain that when Texas declared her independence, and arrayed herself in arms to make good the declaration, she claimed the Rio Grande to be her boundary.

After the first great battle between Mexico and Texas, fought at Bexar, it was provided in the capitulation made by General Cos to General Burleson, among other things, that the convicts brought into the country by Mexican officers should be taken by Cos “*beyond the Rio Grande.*” Again, General Burleson agrees to furnish Cos with provisions “*necessary for his troops to the Rio Grande.*”

In the compact made after the battle of San Jacinto, between the dictator Santa Anna and five of his generals, and the President of the republic, David G. Burnet, 14th May, 1836, the 5th article expressly establishes the Rio Grande as a boundary.

On the 19th December, 1836, the Congress of Texas passed an act entitled “An act to define the boundaries of Texas,” in which they clearly mark out the line of the Rio Grande.

It is thus positively shown that prior to the annexation of Texas

her claim was to the Rio Grande, and her jurisdiction extended with as much right over that portion of the country between the Nueces and the Rio Grande as over any other portion of her territory. Whether she would make good that right of jurisdiction over any portion of the territory, was a question to be decided by the "*ultima ratio regum*."

The war waged between Mexico and Texas was not on the dispute of the boundary, but was for independence on the one side, and subjugation of a rebellious province on the other.

The assertion of claim to this boundary is to be found in various other acts of the Congress of Texas, providing for representation, establishing collection districts, &c., &c.

Texas having demonstrated through a series of years that she was able to make good her revolt from Mexico by force of arms, and maintain herself as an independent State, on the first March, 1845, the Congress of the United States passed a joint resolution for her admission as a State into the Union. The first section provided for her admission with the territory properly included in and rightfully belonging to the republic; and the second section provides that the government of the United States shall have the power to adjust "all questions of boundary that may arise *with other governments*."

The United States having thus made itself a party to the war between Mexico and Texas, it was eminently proper that this condition should be obtained, not for the purpose of acquiring any territorial interest for the government itself, but that it might be possessed of full authority in the exercise of its treaty-making power.

Under this resolution, the people of the independent republic of Texas assembled in convention, and formed a State constitution, in which the territory of the State is described as heretofore established by her, and on the 29th December, 1845, Texas was admitted as a State "on an equal footing with the original States in all respects whatever."

On the 2d February, 1848, a treaty of peace was ratified between the United States and Mexico, by the 5th article of which the Rio Grande is acknowledged as one of the boundaries between the two countries.

Thus the claim which was maintained by Texas, as to her boundary during the period of her independence, was made good and firm by the transactions subsequent. The United States thus acquired no territory for itself within the limits of Texas, but only vindicated her right thereto by the common force of the Union, and as the common protector of the States which compose it.

Under these circumstances, the occupation of any portion of the territory between the Nueces and the Rio Grande by the military forces of the United States, for military purposes, no more placed in abeyance the political jurisdiction of the State of Texas over such portion than would a similar occupation, for similar purposes, of the city of Boston deprive the State of Massachusetts of the authority now exercised over it. These transactions which occurred at Brazos are, therefore, to be judged of by precisely the same rules as if they had occurred under similar circumstances at Boston.

We come next to consider whether a State has authority to regulate the question of pilotage.

By the act of Congress of 7th August, 1849, (1 Stat., 54,) it is provided, "that all pilots in bays, harbors, &c., &c., &c., shall continue to be regulated in conformity with existing laws of the States respectively, or with such laws as the States may respectively *hereafter* enact for the purpose, until further legislative provision shall be made by Congress.

This act is an early recognition by Congress that the States were not deprived of this right, either by the power granted to "regulate commerce," or by any other grant of authority. For if the States had been divested of this power, Congress could not confer it by act.

In the case of *Cooley vs. The Port Wardens of Philadelphia*, the Supreme Court of the United States say: "It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce did not deprive the States of the power to regulate pilots, and that, although Congress has legislated on the subject, its legislation manifests the intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States." (12 How., 320.)

Having thus ascertained the legislative power of the State, we now advert to the act of Texas, approved 17th April, 1846, (p. 60.)

The 9th section regulates the rate of pilotage, and provides that, "whenever a vessel shall decline the service of a pilot outside of the bar, and shall enter the port without one, she shall be liable to the first pilot whose services she so declined for the payment of half pilotage;" and so in the case of going out, &c., &c. The statute then enumerates the class of vessels which are made an exception to the provisions of this section.

The 11th section provides a penalty of \$50 for any other person not appointed as a pilot to discharge these duties.

As this statute does not exempt vessels in the employ of the government of the United States, they are as much subject to its provisions as vessels in the employ of individuals. Government vessels can no more claim exemption from such a regulation than they could from the operation of a State quarantine law, or any other regulation for enforcing the police powers of the State.

Accordingly we find a regulation of the Navy Department, 3d April, 1847, rescinding that of 3d July, 1842, and directing that "ships-of-war will hereafter receive pilots, and pay them according to the laws of the States respectively in which they are employed."

The facts of the case show that not only was the claimant deprived of emoluments which he was entitled to receive, but that in very many instances these emoluments were paid to the government.

In reference to the separate objection made to the schedule D, that the services therein charged for were rendered during a period when claimant was in the employ of the United States, it is sufficient to say that the claimant was an officer of the State of Texas, under bonds to perform the duties of his office. He was the only commissioned pilot for that port. He kept up the boats properly manned necessary for that purpose, and there is nothing shown in the terms of the contract

to authorize the conclusion that he intended to abandon those duties, or give to the government the fees he might earn for that period.

P. PHILLIPS,
Solicitor for Petitioner.

WASHINGTON, *February 1, 1859.*

IN THE COURT OF CLAIMS.

NORTHROP, Administrator of LANGDON, *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for interest on moneys due him for advances made by him as deputy commissary, for balance of salary as deputy commissary, balance of charges as deputy quartermaster general, and for services issuing commissary.

FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. John Langdon, jr., was appointed a deputy commissary in the army of the United States on the 5th of June, 1812, by W. Eustis, Secretary of War. (Record, p. 12.)

Second. The duties of deputy commissaries were defined by statute as follows: (2 U. S. L. 697, § 5.)

“That it shall be the duty of the commissary general of purchases, under the direction and supervision of the Secretary of War, to conduct the procuring and providing all the arms, military stores, clothing, and generally all articles of supply requisite for the military service of the United States; and it shall be the duty of the *deputy commissaries*, when directed thereto, either by the Secretary of War or the commissary general of purchases, or, in cases of necessity, by the commanding general, quartermaster general, or deputy quartermasters, to purchase all such of the aforesaid articles as may be requisite for the military service of the United States.”

Third. The compensation of the deputy commissaries was fixed by statute (2 U. S. L., 697, § 7) as follows:

“The salary of the commissary general of purchases shall be three thousand dollars per annum; and the compensation to a deputy commissary shall not exceed two and a half per centum on the public moneys disbursed by him, nor, in any instance, the sum of two thousand dollars per annum.”

Fourth. That the plaintiff claims in his petition allowances under five different heads.

1. Interest on balances due him.
2. For interest paid by him.
3. A balance of commissions due him as deputy commissary of purchases.
4. For services as deputy quartermaster.
5. For services as issuing commissary.

Fifth. There is no sufficient evidence that said Langdon ever paid any interest, and none that he was authorized to contract to pay it, or that he was promised repayment if he did so.

Sixth. There is no sufficient evidence that there is any balance of commissions as deputy commissary due and unpaid to him.

Seventh. There is no evidence that he was appointed or acted as deputy quartermaster.

Eighth. There is no evidence that he was appointed or acted as issuing commissary.

Ninth. Mr. Langdon's services as deputy commissary ended on the 30th of June, 1815. (Record, p. 65.)

Mr. Burt, the Third Auditor, says:

"Mr. Langdon's second charge for compensation as deputy commissary of purchases from the 31st March, 1815, to 1st January, 1816, is not stated in accordance with the facts disclosed in this investigation. His commission as such closed on the 30th of June, 1815, and he was paid what his commission of two and a half per cent. on his disbursements amounted to within that year, as provided in the law of his appointment." (Record, p. 65.)

Tenth. Mr. Langdon, on the final settlement of his accounts, received all that was due him. (Record, p. 64.)

The Auditor says:

"Accounts and vouchers for old claims.

"Received January 27, and settled May 13, 1817. Due him \$2,740 06, which was paid him on the next day. In this settlement he was allowed the \$3,018 87 heretofore mentioned on account of the cloth contract with James Rundlet.

"He was also allowed \$797 81, being commission of two and a half per cent. on disbursements of \$31,912 29, in full compensation for all disbursements." (Record, p. 60.)

Eleventh. That the whole balance claimed by Mr. Langdon, as assistant quartermaster general, at the time of the rendition of his final account, was \$1,320 09, which was not rendered until a long time after he left the service. (Record, p. 64.)

Twelfth. This last mentioned sum appears to have been all paid, and all others he then claimed, except \$545 65.

The Auditor says: "As before mentioned, Mr. Langdon was paid upon this claim \$1,571 55, in the shape of increased commission on his disbursements, leaving only \$545 55 that was not allowed of all that he demanded at that time as his due." (Record, p. 65.)

Thirteenth. The manner in which Mr. Langdon obtained receipts, and which account for his having seeming balances in his favor:

"It was the *practice* of Mr. Langdon, the deputy commissary of purchases, to send to my (Rundlet's) store almost daily for whatever he wanted in the clothing line, and at the expiration of a few weeks or months, or *whenever he wanted to make a requisition for funds, to get my accounts in duplicate, receipted, and send them on to the War Department, giving me his note or due bill for the amount.*" (Auditor's statement, Record, pp. 54, 55.)

Fourteenth. Mr. Langdon was early informed that interest could not be allowed.

The Third Auditor says: "Mr. Langdon is shown to have been

early apprised by the accountant of the War Department that no charges for interest would be allowable." (Record, p. 55.)

He says again: "From the correspondence (and) records of the accountant of the War Department preserved in this office, it appears, on the settlement of Mr. Langdon's accounts for the *second quarter* of 1813 he was informed that charges for interest paid were a *second time deducted*, so that at an early period he was aware that he had no authority to bind the United States for the payment of interest on his purchases or disbursements, and that such charges would not be passed to his credit on the settlement of his accounts."

Fifteenth. That the whole amount of interest originally claimed was only \$3,106 81, of which \$3,018 87 was claimed to have been paid to Rundlet.

The Auditor states: "From June, 1812, when he commenced the performance of his duties as deputy commissary of purchases, until the final settlement of his accounts as such in 1817, as appears by an examination of his accounts made prior to their being burnt in 1833, the *only charges made by him for interest* were the following:"

On H. & A. Ladd's bill.....	\$23 00	
On H. & A. Ladd's bill	65 84	
		\$88 94
J. Rundlet, on contract with him for cloth.....		3,018 87
		3,107 81

(Record, p. 56, also p. 57.)

Sixteenth. The amount claimed as interest paid J. Rundlet was subsequently paid in another form by order of the War department.

The Auditor says: "Subsequently, however, upon another application, the Secretary of War, on the 7th of May, 1817, allowed the item of \$3,018 87 due J. Rundlet, not as interest in the sense of the items due H. & A. Ladd, but because, in two contracts entered into by Mr. Langdon with J. Rundlet on the 26th of February and 10th of March, 1814, for the purchase on account of the United States of a large quantity of blue cloths and kersey, it is stipulated 'that if the funds are not furnished within thirty days from the delivery of the cloth, there shall be as much added to the price of the cloth as shall amount to the interest for the time payment is delayed after thirty days from the delivery of the cloth,' and the Secretary's decision was, that 'Mr. Rundlet should be paid agreeably to the contract.' Mr. Langdon was accordingly allowed this item in the settlement of his accounts on the 13th of May, 1817, and the money was remitted to him by the Treasurer of the United States." (Record, p. 57.)

Seventeenth. That on some settlements at the Treasury, Mr. Langdon was found largely the debtor of the government, and on other occasions he was found a creditor, but interest was not then charged on either side or demanded.

For a statement of these balances see Record, pp. 59, 60.

Mr. Langdon's accounts rendered, found in the record, show no charge for interest on any of these balances, and none appear in any of the accounts or correspondence.

LEGAL PROPOSITIONS.

FIRST. *Interest is not allowable against the United States except when there is an authorized express agreement to pay it, or there is a law directing its payment.*

This question has been repeatedly before this court, and no argument is now required, nor authorities necessary, to enable the court to understand it fully and to decide it in conformity with its judgment.

There is not only no authority shown which authorized Langdon to pay interest, but there is evidence that he was early notified that it could not be allowed.

But it is shown that all the interest which he claimed at the time to have paid, except a trifling amount to the Ladds, has been allowed and paid. And there is no legal proof that he paid any interest to the Ladds or others which has not been allowed to him.

He demanded no interest at the time on balances due him, and therefore he cannot now properly set up such a claim if it had been originally legal. The record shows that these balances were not real and *bona fide* ones, but were procured by untrue vouchery, and therefore cannot lay the foundation for any equitable claim. The interest which he did actually pay was refunded to him under a contract with the man (Rundlet) to whom he claimed to have paid it.

If the allowance of interest paid had been originally authorized, there is every presumption that it was settled and paid at the time to the satisfaction of the party.

SECOND. *The plaintiff cannot be paid for services rendered not strictly within the line of his official duty, unless he was commissioned in another office, or there was an express and authorized promise to pay extra for such services.*

There is no legal evidence that Langdon held more than the office of deputy commissary. All his accounts were rendered as such deputy, and all the correspondence appears to have been with him in that capacity. There is no legal evidence that he rendered any services other than those required of and were performed by him as a deputy commissary.

There is no evidence of an agreement to pay him for anything extra.

If he performed more duty than the law required of him as a deputy commissary, it proves him to have been a useful citizen, and willing to give his country all his time for the compensation fixed for deputy commissaries. It speaks well of him as a man, but it can lay no foundation for claiming a compensation not authorized by law.

No such charges were in his accounts rendered at the time of the service found in the record, but they seem to have been afterthoughts, first presented long after the close of his service. There is no legal principle upon which they can be allowed, nor is there any facts proved which would authorize their allowance if there were laws applicable to the case.

R. H. GILLET, *Solicitor.*

MARCH 15, 1859.

IN THE COURT OF CLAIMS.

MAY 30, 1859.

JOHN LANGDON'S ADMINISTRATOR *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner states the following case :

1. On the 5th day of June, A. D. 1812, John Langdon, his intestate, was appointed a deputy commissary in the army of the United States, and served in that capacity till June 30, A. D. 1815. He disbursed a large amount of money for the use of the United States. He was frequently obliged to purchase the requisite supplies "either with his own private funds, upon money loaned to him for that purpose, or upon his own individual responsibility upon credit, and upon which he was compelled to pay interest.

2. On various settlements of the decedent's accounts at the Treasury Department, large balances were found to be due him. These balances grew out of advances of his own private funds, of money borrowed, and supplies purchased on credit upon his individual responsibility. These balances, after remaining unpaid many months, were then paid in treasury notes, which were at a discount of about fifteen *per centum* from their par value. The petitioner claims, either interest on the balances or the depreciation of the treasury notes.

3. A commission of two and one-half *per centum* on the whole disbursements made by the petitioner's intestate, as deputy commissary, would have exceeded two thousand dollars a year for the whole period of his service. For the last three quarters of his service he was allowed commissions only, amounting to \$304 83. The petitioner claims that he ought to have been paid \$1,195 17, the difference between \$304 83 and \$1,500 ; *i. e.*, at the rate of \$2,000 per year.

4. The decedent, under the authority of the Secretary of War, performed the duties of deputy quartermaster, and disbursed large sums of money for that service. He was allowed a commission of two and one-half *per centum* on those disbursements ; but the petitioner claims that he was entitled to the pay and emoluments of a deputy quartermaster. The amount now claimed on this account is \$1,320 09.

5. The decedent also performed the duties of issuing commissary for the period of about three years. The petitioner claims therefor an annual compensation of \$1,200.

1. As to the first item :

The allegations of the petitioner on this point are not sustained by evidence. The vouchers, "No. 1," "No. 2," "No. 3," "No. 4," "No. 5," and "No. 6," have not been proved ; nor is there any evidence on file in this case which enables us judicially to say that the decedent ever paid a single dime of interest for the use of the United States. If the vouchers just mentioned should be received as genuine, they are merely the unsworn statements of the persons whose names they bear, and could not, therefore, be received as evidence of the facts asserted by them. But, even if they could be re-

ceived as evidence of those facts, whilst the facts show that the decedent paid money for interest on account of the United States, they do not show that its payment was duly authorized, or that it was made under such necessity, or under such other circumstances as to impose a liability upon the United States. But, in fact, it has not been shown by the evidence that the vouchers are genuine. The claim under this item, therefore, is rejected because it is wholly unsupported by evidence.

2. As to the second item :

We could not form a correct judgment on this claim without having before us all the returns of the decedent, and being put in possession of all the circumstances connected with them. If it be true that the balances in his favor were produced by receipts given to him to be used as vouchers when the money mentioned in them was not actually paid, and that the persons giving them were afterwards paid by him with the money of the United States, it is plain that he sustained no loss thereby, that in fact he made no advances, and that he can have no just claim against the United States for interest on those balances. (See the report of the Third Auditor to the Committee of Claims, H. of R., dated April 4, A. D. 1854.) There is no evidence whatever that the petitioner sustained any loss by reason of the depreciation of treasury notes.

This claim is rejected because it is not sustained by the evidence.

3. As to the third item :

The decedent, as deputy commissary, was entitled to calculate his commissions on the disbursements made by him during the year commencing with the date of his appointment, and not during the calendar or fiscal year, and if the two and one-half *per centum* on the disbursements made during the portion of the year when he went out of office did not exceed two thousand dollars, he was entitled to receive the full commissions thereon, though they might have exceeded the rate of two thousand dollars a year. (United States v. Dickson, 15 Peters's R., p. 151.) According to the report of the Third Auditor, already noticed, he was paid as follows :

From June 11, to December 31st, A. D. 1812, at \$2,000 per annum, his commissions equalling or exceeding that sum.....	\$1,109 89
From January 1, to March 31, A. D. 1813, at same rate..	500 00
From April 1, to June 30, A. D. 1813, at same rate.....	500 00
From July 1, to September 30, A. A. 1813, at same rate..	500 00
From October 1, to December 31, A. D. 1813, at same rate.....	500 00
From January 1, A. D. 1814, to March 31, A. D. 1815, at same rate.....	2,500 00
From March 31, to June 30, A. D. 1815, commissions on his disbursements.....	276 60

Each year of his service constituted a period of calculation, and if a commission of two and a half *per centum* on his disbursements for that

period exceeded \$2,000, then his salary for such period was 2,000 ; but if it fell short of 2,000, then he was entitled to the commissions only. The evidence on file in this case does not enable us to determine whether any injustice was done the decedent in this respect. Without such evidence the presumption is, that he received all that was due him.

This item of the petitioner's claim is not sustained.

4. As to the fourth item :

The decedent was not a deputy quartermaster. He only made disbursements in the Quartermaster's department, and the only compensation to which he was entitled therefor was what his services were reasonably worth. He received a commission of two and a half *per centum* on those disbursements, and it does not appear to us that it was not a full equivalent for his services—all that he reasonably deserved to have.

5. As to the fifth item :

This claim is wholly unsupported by the evidence.

Our opinion is, that the petitioner is not entitled to relief.

WILLIS BENEFIELD vs. THE UNITED STATES.

1. The petition of the claimant.

2. The original documentary evidence in the case, transmitted to the House of Representatives.

3. Claimant's brief.

4. Opponent's brief.

5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 5th day of December, A. D. 1859.

SAM'L B. HUNTINGTON,

Chief Clerk Court of Claims.

CASE OF WILLIS BENEFIELD.

To the Honorable Judges of the Court of Claims.

Your petitioner, Willis Benefield, of Sullivan county and State of Indiana, respectfully represents :

That on the 23d day of January, 1855, the honorable John G. Davis gave notice, under the rule, of his intention to move for leave to introduce a bill for the relief of your petitioner.

That on the 24th day of January, 1855, the honorable John G. Davis filed the petition of your petitioner in the House of Representatives of the United States, a copy of which petition is herewith filed, marked " B," which said petition was on said day referred to the Committee on Public Lands.

WILLIS BENEFIELD.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

WILLIS BENEFIELD *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. The original documentary evidence in the case, transmitted to the House of Representatives.
3. Claimant's brief.
4. Solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said court, at Washington, this 5th day of December, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

CASE OF WILLIS BENEFIELD.

To the honorable judges of the Court of Claims:

Your petitioner, Willis Benefield, of Sullivan county and State of Indiana, respectfully represents:

That on the 23d day of January, 1855, the honorable John G. Davis gave notice, under the rule, of his intention to move for leave to introduce a bill for the relief of your petitioner.

That on the 24th day of January, 1855, the honorable John G. Davis filed the petition of your petitioner in the House of Representatives of the United States, a copy of which petition is herewith filed, marked "K," which said petition was on said day referred to the Committee on Public Lands.

That on the 2d day of February, 1855, the honorable Mr. Henn, from the Committee on Public Lands, made a report upon the petition of your petitioner, which report is hereto attached, marked "O," and at the same time reported the following bill for the relief of your petitioner, marked "P," and which is hereto attached.

That he is informed and believes that no action was taken upon said bill by the House until the 3d day of March, 1855, when the same was referred by a general resolution to the Court of Claims, where said petition is now pending.

Your petitioner asks that his said petition may be docketed and considered, and such report may be made as he may be entitled to under the law and the regulations of said court.

WILLIS BENEFIELD.

DISTRICT OF COLUMBIA, }
Washington City, } ss:

H. D. Scott, being duly sworn, upon his oath, says that he has examined the Journal of the House of Representatives, and he believes that the action as stated in the petition of Willis Benefield as being had in said House is correct in substance and matter of fact.

H. D. SCOTT.

Sworn to before me—

SAMUEL HUNTINGTON,
Chief Clerk Court of Claims.

"K."

To the honorable the Senate and House of Representatives of the United States:

The undersigned, a citizen of Sullivan county, Indiana, respectfully represents:

That on the 21st day of December, 1847, he located land warrant No. 5202, on the northwest quarter of section 21, in township 9 north, range 9 west, in the Vincennes land district.

That the said tract was patented to him on the 10th day of June, 1849, as will appear by reference to the letter of the Commissioner of the General Land Office, marked "a."

He further represents that he took possession of said tract of land, and made lasting and valuable improvements thereon, never for a moment doubting the validity of his title until recently, when he was informed that the said tract had long before his entry, to wit, on the day of , A. D. , been selected for the Wabash and Erie canal, under the act of 3d March, 1854, and approved by the Secretary of the Interior on the 24th of March, 1852, as will appear by the letter marked "b."

He further represents that he made improvements on said land whilst he had the same in possession, under the entry and patent afore-

said, to the value of twelve hundred dollars, as will appear by the paper marked "c."

Therefore, inasmuch as he has acted in good faith in the premises, that by the mistakes of the officers of the government he has not only lost his land, but the proceeds of all his hard labor for many years, and is now turned out of doors with his family, at an advanced age, poor and penniless—

He prays that Congress may, by an act, grant him the right to enter, free of cost, other government lands, to the value of his improvements. And, as in duty bound, will ever pray.

WILLIS BENEFIELD.

"a."

GENERAL LAND OFFICE, *January 10, 1855.*

SIR: In reply to your letter of the 7th instant, I have the honor to inform you that bounty land warrant certificate No. 5202, for 160 acres, issued under the act of February 11, 1847, in the name of Willis Benefield, was patented in his favor June 10, 1849. The same was located, December 31, 1847, upon the northwest quarter of section 21, in township 9 north, of range 9 west, in the district of lands subject to sale at Vincennes, Indiana.

I have the honor further to state that this office can afford Mr. Benefield no relief in the premises.

I am, very respectfully, your obedient servant,

JOHN WILSON,
Commissioner.

Hon. JOHN G. DAVIS, *House of Representatives.*

"b."

GENERAL LAND OFFICE, *January 13, 1855.*

SIR: In answer to your verbal inquiry of to-day, I have the honor to inform you that the north half of section 21, township 9 north, of range 9 west, in the Vincennes district, Indiana, was selected for the Wabash and Erie canal, under the act of 3d March, 1845, and approved by the Secretary of the Interior on the 24th March, 1852.

I am, sir, with great respect, your obedient servant,

JOHN WILSON,
Commissioner.

Hon. JOHN G. DAVIS, *House of Representatives.*

STATE OF INDIANA, }
Sullivan County, } ss:

Willis Benefield, of the county and State aforesaid, being duly sworn, says that he is the identical Willis Benefield who was a private

in Capt. Briggs' company, in the second Indiana regiment of volunteers, in the war with Mexico; that he served the term of one year, and received, under the act of Congress, a warrant for 160 acres, which he located on the northwest quarter of section 21, township 9 north, range 9 west, in the Vincennes district, and received a patent from the United States for the same; that, immediately after locating the same, he took possession of the said lands, and made valuable improvements thereon, under the belief that he had a good title for the same, and has never known anything to the contrary until recently, when he was informed that at the time of his entering said land the same had been conveyed to the State of Indiana, under an act of Congress appropriating lands to the State of Indiana, for the benefit of the Wabash and Erie canal.

WILLIS BENEFIELD.

Subscribed and sworn to before me November 23, 1854.

JOSEPH W. WOLFE, *Clerk.*

“c.”

STATE OF INDIANA, }
Sullivan County, } ss:

William McGrew and James W. Thompson, being duly sworn, say that they are well acquainted with Willis Benefield, the individual who has made the within affidavit, and have been for the last fifteen years. They know him to be the same person who served as a private in Captain Briggs' company, in the war with Mexico, and to whom a land warrant issued, as within described. We know that the said Benefield located his warrant on the within-described land, and has made valuable improvements thereon. The land, at the time of locating the said warrant thereon, we consider was not worth more than Congress price, \$1 25 per acre; but, in consequence of the improvements made by the said Benefield, we consider the land to be worth, at this time, twenty-five hundred dollars, or \$15 per acre. We would further state that the price of lands lying in the vicinity of the land described has been greatly enhanced by the location of the Evansville and Crawfordsville railroad. The improvements thereon consist of about seventy acres being enclosed, and near sixty cultivated, with comfortable buildings thereon.

WILLIAM MCGREW.
JAMES W. THOMPSON.

STATE OF INDIANA, }
Sullivan County, } ss:

I, Joseph W. Wolfe, clerk of the circuit court in and for said county, certify that the above and foregoing affidavits, as subscribed by Willis Benefield, William McGrew, and James W. Thompson, were duly sworn to and subscribed before me.

In testimony whereof, I have hereunto set my hand and seal of said court, hereto affixed.

JOSEPH W. WOLFE, *Clerk.*

NOVEMBER 23, 1854.

STATE OF INDIANA, }
Sullivan County, } ss:

Be it known, on this 15th day of January, A. D. 1855, before me, the undersigned, a justice of the peace within and for said county, came personally James Gardner and William McGrew, who, being duly sworn, upon their oath do say that they are well acquainted with the northwest quarter of section 21, township 9 north, range 9 west, in Sullivan county, Indiana, and being the same tract of land that Willis Benefield, a soldier in the war with Mexico, located his land warrant on, and on which said Benefield now resides; which tract of land has been sold by the trustees of the Wabash and Erie canal. We consider the value of the improvements of the said tract of land, made by the said Benefield, to be of the value of twelve hundred dollars, separately and apart from the value of the land.

WILLIAM MCGREW.

JAMES GARDNER.

Subscribed and sworn to before me; and I certify the said James Gardner and William McGrew are credible witnesses.

WILLIAM C. McBRIDE, *Justice.*

JANUARY 1, 1855.

STATE OF INDIANA, }
County of Sullivan, } ss:

I, Joseph W. Wolfe, clerk of the circuit court within and for said county, certify that William C. McBride is a justice of the peace within and for said county, and that the within and foregoing signature, purporting to be his, is genuine.

Witness my hand and seal of said court hereto affixed.

JOSEPH W. WOLFE, *Clerk.*

JANUARY 15, 1855.

DISTRICT OF COLUMBIA, }
Washington City, } ss:

H. D. Scott, being duly sworn, upon his oath says that he has read the petition of Willis Benefield, and exhibits thereto, presented to the House of Representatives of the United States the 24th day of January, 1855, by the honorable John G. Davis, and from such examination, and a general knowledge of the subject derived from information in Sullivan county, Indiana, he believes the same is true in substance.

H. D. SCOTT.

Sworn to and subscribed before me this 3d day of May, 1856.

C. W. C. DUNNINGTON,

Justice of the Peace.

"O."

FEBRUARY 2, 1855.

Report of the Committee on Public Lands in the case of Willis Benefield.

Mr. HENN, from the Committee on Public Lands, to whom was referred the petition of Willis Benefield, asking relief on account of the failure of title to a certain tract of land located by him, made the following report :

That they have examined the papers filed in this case, and find the facts to be as follows : that said Benefield served for the term of one year as a soldier in Captain Briggs' company, second regiment Indiana volunteers, during the war with Mexico ; that for said service there was granted to him a land warrant (No. 5202) for one hundred and sixty acres of land, under the act of February 11, 1847; that on the 31st day of December, 1847, he located said land warrant on the northwest quarter of section 21, township 9 north, of range 9 west, in the district of lands subject to sale at the land office at Vincennes, Indiana; that on the 10th day of June, 1849, a patent was issued in his favor for said land; that said Benefield settled upon said land, and improved the same by fencing and cultivating between sixty and seventy acres, and by erecting buildings thereon, all of which improvements are estimated to be worth \$1,200; that said quarter-section has since been claimed by the State of Indiana as a part of the lands granted to said State for the construction of the Wabash and Erie canal, under the act of March 3, 1845, and the same was confirmed to said State under said act, by decision of the Secretary of the Interior, dated March 24, 1852; whereby, notwithstanding the issue of said patent to said Benefield, his title has wholly failed.

The committee are of the opinion that Mr. Benefield has been seriously damaged by the failure of title, as before related, and that the injury he has sustained has been occasioned wholly by the fault of the United States, and not on account of any laches or fault of his own, and therefore he ought to have relief. The committee have had some doubt as to the measure of damages that ought to be allowed, but are of opinion that at least six hundred and forty acres of land ought to be granted to said Benefield, in lieu of the one hundred and sixty acres to which title has failed; and therefore they report a bill authorizing him to enter that quantity free of cost, the passage of which they respectfully recommend.

"P."

FEBRUARY 2, 1855.

Mr. HENN, from the Committee on Public Lands, reported the following bill :

A BILL for the relief of Willis Benefield, of Indiana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Willis Benefield, of the

State of Indiana, be, and he is hereby, authorized to enter, in legal subdivisions, free of cost, the quantity of six hundred and forty acres of any of the public lands of the United States which may be subject to private entry at a minimum price not exceeding one dollar and twenty-five cents per acre, upon a surrender of the patent for the northwest quarter of section number twenty-one, in township number nine north, of range number nine west, in the district of lands subject to sale at the land office at Vincennes, Indiana, and a proper relinquishment of any title he may have in the same by virtue of such patent.

SEC. 2. *And be it further enacted*, That the entry of the land hereby authorized shall be made under such regulations as shall be prescribed by the Commissioner of the General Land Office, and the same shall be in full satisfaction of any claim to bounty land which said Benefield may have under the act of February 11, 1847; and land warrant number five thousand two hundred and two, issued to said Benefield under said act, shall be surrendered and cancelled prior to any entry hereby authorized.

Affidavit of claimant.

STATE OF INDIANA, }
 Sullivan County, } *set* :

Willis Benefield, of the county and State aforesaid, being duly sworn, says that he is the identical Willis Benefield who was a private in Captain Briggs' company, in the second Indiana regiment of volunteers, in the war with Mexico; that he served the term of one year, and received, under the act of Congress, a warrant for 160 acres, which he located on the northwest quarter of section 21, township 9 north, range 9 west, in the Vincennes district, and received a patent from the United States for the same; that immediately after locating the same he took possession of the said lands, and made valuable improvements thereon, under the belief that he had a good title for the same, and has never known anything to the contrary until recently, when he was informed that at the time of his entering said land the same had been conveyed to the State of Indiana, under an act of Congress appropriating lands to the State of Indiana, for the benefit of the Wabash and Erie canal.

WILLIS BENEFIELD.

Subscribed and sworn to before me November 23, 1854.

JOSEPH W. WOLFE, *Clerk.*

Affidavit of McGrew and Thompson.

STATE OF INDIANA, }
 Sullivan County, } *ss* :

William McGrew and James W. Thompson, being duly sworn, say that they are well acquainted with Willis Benefield, the individual who

has made the within affidavit, and have been for the last fifteen years ; they know him to be the same person who served as a private in Captain Briggs' company in the war with Mexico, and to whom a land warrant issued, as within described ; we know that the said Benefield located his warrant on the within-described land, and has made valuable improvements thereon ; the land at the time of locating the said warrant thereon we consider was not worth more than the Congress price—\$1 25 per acre ; but in consequence of the improvements made by the said Benefield, we consider the same to be worth at this time the sum of \$2,400, or \$15 per acre ; we would further state that the prices of lands lying in the vicinity of the land described within has been greatly enhanced by the location of the Evansville and Crawfordsville railroad. The improvements thereon consist of about seventy acres being enclosed, and near sixty cultivated, with comfortable buildings thereon.

WILLIAM MCGREW.

JAMES W. THOMPSON.

STATE OF INDIANA, }
Sullivan County. }

I, Joseph W. Wolfe, clerk of the circuit court in and for said county, certify that the above and foregoing affidavits, as subscribed by Willis Benefield, William McGrew, and James W. Thompson, were duly sworn to and subscribed before me.

In testimony whereof, I have hereto set my hand and seal of said
[L. s.] court, hereto affixed, November 23, 1854.

JOSEPH W. WOLFE, *Clerk.*

Affidavit of Gardner and McGrew.

STATE OF INDIANA, }
Sullivan County, } *set :*

Be it known that on this 15th day of January, A. D. 1855, before me, the undersigned, a justice of the peace within and for said county, came personally James Gardner and William McGrew, who, being duly sworn, upon their oaths do say that they are well acquainted with the northwest quarter of section 21, township 9 north, range 9 west, in Sullivan county, Indiana ; and being the same tract of land that Willis Benefield, a soldier in the war with Mexico, located his land warrant on, and on which said Benefield now resides ; which tract of land has been sold by the trustees of the Wabash and Erie canal. We consider the value of the improvements of the said tract of land made by the said Benefield to be of the value of \$1,200, separately and apart from the value of the land.

WILLIAM MCGREW.
JAMES GARDNER.

Subscribed and sworn to before me ; and I certify the said James Gardner and William McGrew are credible witnesses.

WILLIAM C. McBRIDE, *Justice.*

JANUARY 15, 1855.

STATE OF INDIANA, }
 County of Sullivan, } ss :

I, Joseph W. Wolfe, clerk of the circuit court within and for said county, certify that William C. McBride is a justice of the peace within and for said county, and that the within and foregoing signature, purporting to be his, is genuine.

Witness my hand and seal of said court hereto affixed, January
 [L. s.] 15, 1855.

JOSEPH W. WOLFE, *Clerk.*

Letter from Commissioner of the General Land Office.

GENERAL LAND OFFICE, *January 13, 1855.*

SIR: In answer to your verbal inquiry of to-day, I have the honor to inform you that the north half of section twenty-one, in township nine north, of range nine west, in the Vincennes district, Indiana, was selected for the Wabash and Erie canal, under the act of the 3d March, 1845, and approved by the Secretary of the Interior on the 24th March, 1852.

I am, sir, with great respect, your obedient servant,
 JOHN WILSON, *Commissioner.*

Hon. JOHN G. DAVIS,
House of Representatives.

Letter from Commissioner of the General Land Office.

GENERAL LAND OFFICE, *July 4, 1858.*

SIR: I have the honor to return herewith the petition of Willis Benefield, filed by you on the 31st ult., and, in regard to the matter, to state that it appears from the records of this office that the north half of section twenty-one, township nine north, of range nine west, Vincennes district, Indiana, was selected, September 28, 1846, for the Wabash and Erie canal, under the provisions of the act of Congress approved March 3, 1845, and approved by the Secretary of the Interior March 24, 1852. The original list of the selections by the State authorities is not to be found on the files of this office, but, if material, a call for it will be made upon the officer in charge at Vincennes. It also appears that the northwest quarter of the above-mentioned section, township, and range, a tract embraced by the said selection, was located, December 31, 1847, with bounty land warrant No. 5202, issued under the act of 11th February, 1847, in the name of Willis Benefield, and that a patent for said tract issued to Willis Benefield on the 10th June, 1849.

The register at Vincennes was, on the 12th July, 1854, advised of the illegality of the location, and instructed to inform Mr. Benefield

of the same, and request a return of the patent for cancellation; this having been done, and a relinquishment of the tract by Mr. Benefield, dated February 22, 1855, filed in this office, the location was cancelled, and the warrant transmitted to the Hon. John G. Davis March 2, 1855.

Very respectfully, your obedient servant,
 THOMAS A. HENDRICKS,
Commissioner.

Hon. R. H. GILLET,
Washington, D. C.

Letter from Commissioner of the General Land Office.

GENERAL LAND OFFICE, *August 13, 1858.*

SIR: I have the honor to acknowledge the receipt of your letter of the 7th instant, and to enclose certified copies of the papers connected with the case of the location of the land warrant No 5202, for 160 acres, issued under the act of 1847, in the name of Willis Benefield.

Very respectfully, your obedient servant,
 THOMAS A. HENDRICKS,
Commissioner.

Hon. R. H. GILLET,
Solicitor Court of Claims, Washington, D. C.

GENERAL LAND OFFICE, *August 13, 1858.*

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications from the records and files of this office.

In testimony whereof, I have hereunto subscribed my name and
 [L. s.] caused the seal of this office to be affixed, at the city of
 Washington, on the day and year above written.

THOMAS A. HENDRICKS,
Commissioner of the General Land Office.

Letter from the Hon. John G. Davis.

HOUSE OF REPRESENTATIVES,
January 7, 1855.

DEAR SIR: The case to which I called your attention a few days ago is this.

Willis Benefield, of Sullivan county, Indiana, served one year in the Mexican war, for which he received a land warrant, which he located on the northwest quarter of section twenty-one, township 9, range 9 west, and received a patent therefor. He moved on the land and made

valuable improvements. Lately it has been found to belong to the Wabash and Erie canal, and by them sold, and Benefield loses his land and all his labor on the premises.

These facts being proved, I think Congress will grant him other lands to the value of his improvements. I presume your office will return him his warrant, or refund him the amount in cash; am I right in this?

Please send me a letter, stating the facts in regard to his entry of the land, and that at that time it was the property of the canal, that I may make out a case for the action of Congress, at your earliest convenience.

The session is short and I am anxious to get the case up at the earliest moment.

Your obedient servant,

JOHN G. DAVIS.

Hon. JOHN WILSON, *Commissioner, &c.*

Letter from Commissioner of the General Land Office.

GENERAL LAND OFFICE, *January 10, 1855.*

SIR: In reply to your letter of the 7th instant, I have the honor to inform you that bounty land warrant certificate No. 5202, for 160 acres, issued under the act of February 11, 1847, in the name of Willis Benefield, was patented in his favor on the 10th of June, 1849; the same was located December 31, 1847, upon the northwest quarter of section 31, in township 9 north, of range 9, west, in the district of lands subject to sale at Vincennes, Indiana.

I have the honor further to state that this office can afford Mr. Benefield no relief in the premises.

I am, very respectfully, your obedient servant,

JOHN WILSON, *Commissioner.*

Hon. JOHN G. DAVIS,

House of Representatives.

Letter from Hon. John G. Davis.

WASHINGTON, *February 2, 1855.*

SIR: Enclosed I return the patent issued to Willis Benefield for 160 acres of land, which was taken for canal purposes; you will please cancel the same and return me his land warrant.

Respectfully, your obedient servant,

JOHN G. DAVIS.

Hon. JOHN WILSON,

Commissioner General Land Office.

*Letter from the Commissioner of the General Land Office.*GENERAL LAND OFFICE, *February 12, 1855.*

SIR: In reply to your letter of the 2d instant, I have the honor to state that before the patent of Willis Benefield can be cancelled and his warrant returned, the patent must be relinquished in the manner and form prescribed in the third paragraph of the enclosed circular, of the 19th of January, 1854. Said patent is herewith enclosed.

Very respectfully, your obedient servant,

JOHN WILSON, *Commissioner.*

Hon. JOHN G. DAVIS,
House of Representatives.

*Letter from Hon. John G. Davis.*HOUSE OF REPRESENTATIVES,
February 29, 1855.

SIR: Enclosed is the patent of Willis Benefield, also his deed of relinquishment for the land therein mentioned. Will you please enclose me, before I leave here, Mr. Benefield's land warrant.

Respectfully, your obedient servant,

JOHN G. DAVIS.

Hon. JOHN WILSON, *Commissioner, &c.*

Release by W. Benefield.

Know all men by these presents that I, Willis Benefield, of Sullivan county, Indiana, do hereby release to the United States all the right, title, and claim that I hold in and to the northwest quarter of section twenty-one, in township nine north, of range nine west, estimated to contain one hundred and sixty acres, selected in the Vincennes land district, and in Sullivan county, Indiana.

Given under my hand and seal this 22d day of February, A. D. 1855.

WILLIS BENEFIELD. [L. s.]

STATE OF INDIANA, *Sullivan County, sct:*

I, James H. Reed, recorder in and for said county, certify that Willis Benefield this day acknowledged the execution of the above deed.

I further certify that I have duly recorded this deed in book L, page 578; and that the records of this office show no encumbrance upon said land.

Witness my hand and seal of office hereto attached, at Sullivan, [L. s.] February 22, 1855.

JAMES H. REED,
Recorder Supreme Court of Indiana.

Location by W. Benefield.

LAND OFFICE AT VINCENNES.

Received at this office November 20, 1847.

JAMES S. MAYES, *Register*.

NOVEMBER 20, 1847.

I, Willis Benefield, of Sullivan county, Indiana, do hereby locate the northwest quarter of section twenty-one, township number nine north, of range number nine west, containing one hundred and sixty acres, in satisfaction of the warrant herein mentioned.

WILLIS BENEFIELD.

Attest:

JAMES S. MAYES, *Register*.SAMUEL WISE, *Receiver*.

[This location cancelled, see letter to register, Vincennes, Indiana, March 2, 1855.]

LAND OFFICE, Vincennes, December 31, 1847.

We certify that the above location is correct, being in accordance with law and instructions.

JAMES S. MAYES, *Register*.SAMUEL WISE, *Receiver*.*Letter from Commissioner of the General Land Office.*

GENERAL LAND OFFICE, March 2, 1855.

SIR: The location, in the name of Willis Benefield, with military land warrant No. 5202, for 160 acres, act of 1847, upon the northwest quarter-section twenty-one, township 9, range 9 west, has this day been cancelled, because said location interferes with a grant for the benefit of the Wabash and Erie canal, under the act of Congress approved March 5, 1845, and the warrant certificate has been returned to said Benefield, care of Hon. John G. Davis.

You will please enter the cancellation on the books of your office.

Very respectfully, your obedient servant,

JOHN WILSON, *Commissioner*.

REGISTER OF THE LAND OFFICE,

Vincennes, Indiana.

Letter from Commissioner of the General Land Office.

GENERAL LAND OFFICE, March 2, 1855

SIR: I have the honor herewith to transmit military bounty land warrant certificate No. 5202, for one hundred and sixty acres, act of 1847; the location having been cancelled according to the request

contained in your letter of the 29th ultimo, the receipt of which you will please acknowledge.

Very respectfully, your obedient servant,

Hon. JOHN G. DAVIS,
House of Representatives.

JOHN WILSON,
Commissioner.

GENERAL LAND OFFICE, *August 13, 1858.*

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification from the patent records of this office.

In testimony whereof, I have hereunto subscribed my name and
[L. S.] caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

THOS. A. HENDRICKS,
Commissioner of the General Land Office.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Know ye, that in pursuance of an act of Congress, entitled "An act to raise for a limited time an additional military force, and for other purposes," approved February 11, 1847, Willis Benefield, private in Captain Briggs' company, second regiment Indiana volunteers, having deposited in the General Land Office a warrant in his favor, numbered 5202, there is therefore granted by the United States unto said Willis Benefield, and to his heirs, the northwest quarter of section twenty-one, in township nine north, of range nine west, in the district of lands subject to sale at Vincennes, Indiana, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, which said tract has been located in satisfaction of the above-mentioned warrant, in pursuance of the act of Congress above mentioned, approved February 11, 1847; to have and to hold the said part of said section of land, with the appurtenances thereof, unto the said Willis Benefield, his heirs and assigns forever.

In testimony whereof, I, Zachary Taylor, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.
[L. S.] Given under my hand, at the city of Washington, the tenth day of June, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States the sventy-third.

By the President:

ZACHARY TAYLOR,
By THOMAS EWING, JR.,
Secretary.

N. SARGENT, *Recorder of the General Land Office.*

Recorded, volume 18, page 169

Cancelled. See letter to register, March 2, 1855.

IN THE COURT OF CLAIMS.

WILLIS BENEFIELD *vs.* THE UNITED STATES.*Brief for petitioner.*

The petitioner, in 1847, located a land warrant upon the northwest quarter of section twenty-one, township 9, range 9 west, in Indiana, and on the 10th of June 1849, a patent was issued to him by the United States for it.

He took possession of the land, cultivated it, and made valuable improvements upon it. It was afterwards claimed by the trustees of the Wabash and Erie canal, by virtue of a grant from the United States for the purpose of completing said canal from Terre Haute to the Ohio river. It was sold by the trustees, and the purchaser ousted the petitioner of his possession, taking all the improvements.

The evidence shows that at the time Benefield took possession of the land it was worth but \$1 25 per acre, or \$200; that he made improvements to the value of \$1,200; and that the land enhanced in value, while he held it, to \$2,500. He is, therefore, entitled to recover from the United States the difference between \$1 25 and \$15, and also the value of his improvements. This is the amount of his actual loss. The first item is \$13 75 per acre, or \$2,200, to which the improvements, \$1,200, should be added, making \$3,400.

I submit that he is entitled to a recovery for this amount.

R. W. THOMPSON,
Attorney for Petitioner.

MAY, 1858.

IN THE COURT OF CLAIMS.

WILLIS BENEFIELD *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF ON ARGUMENT.

Claim for the value of a quarter section of land and improvements patented to claimant, which had been previously granted by Congress for the use of the Wabash and Erie canal.

FACTS AS UNDERSTOOD BY THE SOLICITOR.

1. The lands in the Vincennes land district, Indiana, of which this quarter section was a part, were surveyed prior to March 3, 1845.

This is a historical fact, but shown by the surveys in the General Land Office.

2. That on the 3d of March, 1845, Congress passed "an act to grant certain lands to the State of Indiana, the better to enable the State to extend and complete the Wabash and Erie canal from Terre Haute to the Ohio river."

The first section of this act provides (5 U. S. L., 781) "that there

be, and hereby is, granted to the State of Indiana, for the purpose of aiding said State in extending and completing the Wabash and Erie canal from Terre Haute, in the county of Vigo, in said State, to the Ohio river, at Evansville, in said State, as the course thereof has been established and surveyed by the authority of said State, one moiety of the public lands, (remaining unsold, and not otherwise disposed of, encumbered, or appropriated,) in a strip of five miles in width on each side of said canal, to be selected by an agent or agents to be appointed by the governor of said State, subject to approval of the Secretary of the Treasury of the United States, reserving to the United States each alternate section (or other proper subdivision of said land) from one end of the said canal to the other; and before the selections, to be made as aforesaid by such agent or agents, shall be deemed to have been made and perfected, a chart or charts, showing the courses and distances and points of termination of said canal, shall be reported, or caused to be reported, by the governor of Indiana, or by some person or persons by him appointed, to the Commissioner of the General Land Office.

“SEC. 2. That, for the purpose hereinbefore mentioned, there be, and hereby is, granted to the said State, in addition to the grant hereinbefore provided for, one moiety of all the other lands in the Vincennes land district in said State, and which remain, as aforesaid, unsold, and not otherwise disposed of, encumbered, or appropriated, to be selected under the authority and by the direction of the governor of said State: *Provided*, That in the selection of the lands by this section provided for, no lands shall be comprehended which, in the first section of this act, are (in alternate sections or other proper subdivisions) directed to be reserved as aforesaid; and the lands so selected shall be reported, or caused to be reported, by the governor of the State to the register of the land office at Vincennes, before such selection shall be deemed to be made and completed.

“SEC. 3. That all the lands by the first and second sections of this act granted as aforesaid shall, after the selections thereof shall have been made and completed as aforesaid, be subject to be disposed of by the general assembly of said State, for the purpose aforesaid, and no other; and the President shall direct the further sales of the public lands in the Vincennes land district aforesaid, to be suspended until the governor of said State shall have caused the selections aforesaid to be made and perfected as aforesaid, and shall have notified the Secretary of the Treasury thereof: *Provided*, That such suspension shall not continue longer than twelve months from and after the passing of this act.”

3. That the quarter section in question was not within the five miles granted by the first section of the act, but was included in those granted by the second section. (Information obtained at the land office.)

4. That the governor caused the charts mentioned in the act to be filed in the General Land Office. (Information from the land office.)

5. That the President issued his proclamation withdrawing the lands from sale in the Vincennes district, as provided in the third section of said act.

6. That, under the authority of the governor of Indiana, the selections were made under the second section of said act, and reported to the register of the land office at Vincennes, on the 28th of September, 1846. (Letter of the Commissioner General Land Office, July 4, 1858.)

7. That his selection covered the quarter section in question. (Id. Letter.)

8. That on the 31st of December, 1847, three months after such selection by the governor, the claimant, Benefield, located his bounty land warrant No. 5202, issued under the act of the 11th of February, 1847, (9 U. S. L., 123,) upon this same quarter section, and on the 10th of June, 1849, received a patent therefor. (Id. Letter.)

9. That when the error was discovered, the land office, on the 12th of July, 1854, notified Benefield, so that he might return the patent issued to him for cancellation, if he desired, which he did, and he executed and acknowledged a relinquishment dated February 22, 1855, stating that I "do hereby release to the United States all the right, title, and claim that I hold in and to" the land in question. This relinquishment was duly acknowledged according to the laws of Indiana. On the return of the patent and the receipt of this release, on the 2d of March, 1855, the location made by Benefield, and filed, and on which the patent was issued, was duly cancelled at the General Land Office. (See Davis' and Commissioner's letters, and the release.)

10. That on the 2d of March, 1855, Benefield's bounty land warrant was returned to him with the location cancelled, so that it could be again located by him. Mr. Davis, M. C., on returning, on the 2d of February, 1855, the patent, requested it to be cancelled and the original warrant to be returned; and this was done on the 2d of March, as is shown by the Commissioner's letter.

11. The claimant is at liberty to locate his bounty land warrant at any time upon any public lands open to entry at private sale, precisely the same as if it had never been located.

12. The facts in this case warrant the inference that Benefield in locating, and the Land Office in issuing the patent, acted under a misapprehension as to whether the land in question was open to entry or not.

13. The patent contains no guaranty of title.

LEGAL PROPOSITIONS.

FIRST. *A conveyance of lands, when there is no covenant of warranty, seizin, or of legal right to convoy, does not raise a legal or equitable liability in case of failure of the grantor's title.*

Without covenants in relation to the right to convey, or in regard to title or warranty, no liability can accrue, because the grantor made no agreement upon the subject, and could not, therefore, violate any. No implied obligation can be predicated upon a deed of conveyance, which merely transfers the grantor's interest, if he has any. If a covenant of warranty or seizin were inserted in a government patent it would be void, because there is no law authorizing any officer of government to enter into such a covenant. The absence of any such

law is ample evidence that it was not the intention of Congress to clothe any person with such power, and none has been exercised in this case.

SECOND. *In case of mutual mistake of the parties, no liability arises to either party, and all that either can ask is to annul the contract and be restored to his original condition.*

The evidence in this case clearly shows that both parties acted under a mistake in relation to the fact whether the land in question was open to entry at private sale. Benefield must have believed it liable to entry or he would not have located upon it, unless, indeed, he supposed if he could procure a patent he would hold the land whether it had been appropriated to the use of the canal or not. This he does not state, or admit; and, therefore, it is presumed that he did not know that the land in question had been transferred by a law of Congress and the act of the governor, from the government to the State of Indiana, for the use of the Wabash and Erie canal.

The local and general land offices equally made a mistake. The law vesting the land in the State, on the location by the governor, passed on the 3d of March, 1845, and the location by the governor and schedule of selections was made on the 26th of September, 1846, and filed with the register of the Vincennes land office. Benefield located his warrant on the 31st of December, 1847, and obtained his patent on the 10th of June, 1849. The register who permitted the location at Vincennes, and the commissioner who issued the patent, overlooked the fact that this very lot had been included in the governor's list of selections. Neither could have had any object in misleading him, but clearly acted under a mistake. The fact of Benefield having made a location on this lot may have induced them to be less vigilant than they ought to have been, and that may have been the real cause of their mistake.

Certainly the government did not mislead the claimant any more than he misled the government. Both fell into the same error in supposing that the land in question belonged to the United States and was on sale. Benefield was as much in fault as the government, and cannot now throw the responsibility of their common mistake upon the latter. It is a case where neither is in fault, or both are; and in either case each must bear his own loss, as in the case of damages by collision, where both vessels are equally in fault. In such cases it is well settled that neither party can recover. (See *Schooner Catharine vs. Dickinson*, 17 How., 170.)

THIRD. *If the claimant had the means of knowing whether the government owned that lot on which he located his warrant, he has no right to complain if he did not resort to that means to inform himself.*

The facts show that the claimant had the means of knowing who was the owner of the land in question.

1. There was the act of the 3d of March, 1845, which was a public law, of which all persons were bound to take notice, vesting in the State of Indiana one-half of the lands in the Vincennes land district, to be selected by the governor.

2. The provision for, and proclamation of the President, withdrawing for a year all the unsold lands in the district.

3. The report of the governor, or his agent, filed in the office of the register of the Vincennes land office, showing the selections made by him, which, under the law, vested in the State.

4. The general notoriety which naturally attend transactions of so public a nature where they occur.

Through these instrumentalities he had the same means of knowing which the government had. If he had made inquiry and investigated, he would have known that the government did not own the land at the time he made his location. If he omitted to do so, he must bear the consequences. He was the first mover in the matter, and committed a mistake. Having done so, he cannot complain that others followed him in his mistake. It was as much his duty to see that he located upon the right land as it was that of the government giving a patent for it. When at the register's office in the Vincennes district he had it in his power to have looked at the list of lands selected by the governor, and see whether he was locating upon government or State lands. If he had done so he would have avoided his error and the consequences. For his omission in this respect he can blame no one but himself, and cannot now throw the consequences flowing from it upon the government.

FOURTH. Having received back his land warrant, cancelled his patent, and relinquished his claim to the land, the contract between the parties must be considered as rescinded on both sides, and, consequently, no claim for damages can be sustained by either party.

The evidence shows that the patent was voluntarily returned to the General Land Office to be cancelled, and the original warrant restored at the request of the claimant. The government had no power to compel either step. From the evidence it clearly appears that he wished his warrant returned, that he might relocate it, and he relied upon Congress to make him a grant of other lands to compensate him for the loss of his improvements. He was the moving party in the arrangement, restoring things to their original condition. He did not then assert a legal right upon the government, but relied upon the liberality of Congress to relieve him from the consequences of his mistake in locating upon granted lands. So far as legal right is concerned, the transaction was settled and ended. If Congress chooses to be so liberal as to relieve him from the consequences of his own error, it can do so. It does not need the advice of this court telling it that it ought to be liberal; and if it did, this court is not authorized to give it. It cannot consider the question of damages, because none, in a legal sense, have been sustained, and none have been proved by competent evidence; and for these reasons that question has not been considered in the preparation of this brief.

As the claimant has no legal rights to be ascertained by the court, and everything depends upon the discretion and liberality of Congress, the case should be dismissed, leaving the party to go to Congress if he chooses.

R. H. GILLET, *Solicitor.*

AUGUST, 1858.

IN THE COURT OF CLAIMS.

MAY 30, 1859.

WILLIS BENEFIELD *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the court.

The petitioner, a soldier in the Mexican war, held a land warrant, No. 5202, for 160 acres, which, on the 31st December, 1847, he located on the northwest quarter of section 21, township 9 north, of range 9 west, Vincennes district, Indiana, and he received a patent for the same June 10, 1849. He entered upon the possession of the land and made improvements thereon, which are described in the evidence as consisting "of about 70 acres being enclosed, and near 60 cultivated, with comfortable buildings thereon." In 1854 it was ascertained that the land thus located by the petitioner had been previously disposed of by the United States, and on the 12th July, 1854, the petitioner was informed of the fact. On the 7th January, 1855, he requested that his warrant might be returned to him; and on his releasing to the United States the land located, the patent which had been issued to him was cancelled, the original warrant was redelivered to him.

The evidence in the record shows that the land increased in value while the petitioner held it by the sum of.....	\$2,200
And that the value of the improvements made by the petitioner apart from the value of the land was.....	1,200
And the plaintiff claims of the United States.....	3,400

But the plaintiff has no legal ground of claim. The patent or grant of the United States contains no warranty or covenant of title, and the contract cannot be carried beyond its terms. By the settled rule of the common law, those terms do not make or imply a warranty or covenant of title. (Kent Com., 4 vol., pp. 471, 474, and notes.) Admitting that the petitioner was led into error and loss by the mistake of the officers in the land office, the United States are not liable in damages for the mistakes of their officers.

If the United States were liable as on a covenant of warranty of title, the rule of damages would be the value of the land when the warranty was made, or \$1 25 per acre, and no more. The petitioner has received that, or its equivalent, in the return of his warrant for a new location at \$1 25 per acre. He cannot hold this and have a claim for damages besides.

The return of the warrant was tantamount to the return of the purchase money for lands erroneously located; and this is the only measure of relief the statutes of the United States prescribe for lands purchased and of which the title fails. (4 Stat. 80, c. 5, Jan. 12, 1825.)

On the whole case, we are of the opinion that the petitioner is not entitled to relief.

J. ALEXIS PORT.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

THE COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of

J. ALEXIS PORT *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Original documentary evidence transmitted to the House of Representatives.
3. Claimant's brief.
4. United States Solicitor's brief.
5. Opinion of the court on the preliminary hearing, ordering testimony to be taken.
6. Opinion of the court on the final hearing adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said court, at Washington, this fifth day of December
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

J. Alexis Port's, claim on account of tobacco sold him in Mexico by the United States.

To the honorable the Judges of the Court of Claims :

The petition of J. Alexis Port, of the city of Puebla, in the Republic of Mexico, sheweth : That he is a French citizen, and has resided in said city of Puebla for more than fourteen years.

Your petitioner would further show, that while the United States army was in possession of said city of Puebla, Colonel Thomas Childs, then acting governor of Puebla, issued an order in the words following, viz:

“HEADQUARTERS, MILITARY DEPARTMENT OF PEUBLA,
“*Peubla, September 12, 1847.*

[“Order No. 23.]

“Captain Webster, A. Q. M., will sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed.

“THOMAS CHILDS,
“*Colonel Commanding.*”

That in pursuance of said order, Captain Charles R. Webster of the army of the United States, advertised for sale at public auction five hundred bales of tobacco; that the advertisement was made on the 16th day of October, A. D. 1847, for a sale on the 19th of said October, by causing the notices of such sale in Spanish and English to be publicly fixed and placarded on the corners of the principal streets and thoroughfares of the city of Puebla, and that the following is a true copy of the original advertisement in Spanish, and was taken from some public place after the sale of said tobacco:

“AVISO.

O'bre 16 de 1847.

“Se venderá unos quinientos tercios de tabaca, para el 19 del presentes, en el cuartel de Sor. San José, á las tres de la tarde, en venta publica.”

Of which said advertisement the following is a translation:

“On the 19th instant, there will be sold at public auction, at three o'clock in the afternoon, at the cuartel San José, 500 bales tobacco.”

Your petitioner would further show, that on the 21st day of said October, he purchased said 500 bales of tobacco, at twenty-four dollars per bale, amounting to the sum of twelve thousand dollars, and paid for the same the sum of eight thousand dollars in cash, and by a credit to the United States, in account with your petitioner, the sum of four thousand dollars; the United States being at the time indebted to your petitioner for supplies furnished the army.

Your petitioner would further show, that on the 27th day of the same month of October he sold the said tobacco to Señor Don Juan Abadie, a merchant of said city, for the price of thirty-three dollars per bale, amounting in all to the sum of sixteen thousand five hundred dollars. That after said sale, on the 30th day of said month of October, your petitioner received the following notice from Captain Webster.

ASSISTANT QUARTERMASTER'S OFFICE,
October 30, 1847.

SIR: You will please suspend the sale of the tobacco purchased of me for the present. You are, perhaps, aware that the whole is claimed by Señor Domercq.

Your obedient servant,

CHARLES R. WEBSTER.

J. A. PORT, Esq.

Your petitioner would further state, that on the 13th November, 1847, said Señor Abadie sold the same tobacco to Gormio & Co., merchants of the city of Mexico, for thirty-five dollars per bale, amounting to \$17,500, accompanied with a warranty that the said tobacco was his legitimate property, and that he would present the proper documents and certificates of the American authorities, so that the sale might have no obstruction, and the property might be removed at pleasure without any impediment whatever, and that the seller should be responsible to clear up any difficulty which might arise. That on the 15th of said November, Gordon & Murray purchased said tobacco at forty-eight dollars per bale of 214 pounds, amounting to \$21,000, for which they paid in cash, and the said sellers warranted the sale against any difficulties which might arise.

Your petitioner would further show, that after the sale by him of the tobacco, purchased as aforesaid, he was informed that the tobacco was claimed by a merchant of Puebla, of the name of Domercq; and on the 1st November, 1847, General Worth addressed a letter to Colonel Childs on this subject, in which he remarks: "I now learn that by your order the tobacco has been taken out of the hands of Hargous's agent and resold. If so, whatever may have been your necessities in the way of funds for public purposes, a decided wrong has been done to the purchaser," &c.

That on the 17th of said November, by order of General Lane, a board of inquiry, consisting of four officers of the army, was convened at Puebla, for the purpose of examining into the matter, who had before them a communication from Mr. Domercq and your petitioner, and examined as witnesses Colonel Childs and Captain Webster. And a majority of said board declare that they are of the opinion that the five hundred bales of tobacco, sold by Captain Webster to Mr. Port, were not at the time of said sale the property of the United States, and annul the possession and ownership thereof to him, the said Domercq; and that the quartermaster, Captain Webster, pay to Mr. Port \$8,000, with interest from the day of its payment to him, and cancel the credit of \$4,000 to the United States in its account with Port for clothing, &c., supplied.

That on the 30th of said November, Captain Webster addressed a letter to General Lane, stating that Mr. Domercq informed him that the last buyer of the tobacco refused to give up the key, and requested that he would send an officer with a file of men to see that he had possession of what the court had decided was his property, and put him in quiet possession of the same without any further disturbance;

and in pursuance of this request the said tobacco was forcibly seized and delivered to said Domercq.

Your petitioner also shows, that at time of the several sales and transfers of said tobacco as aforesaid, the prices at which the said tobacco was sold were the fair market prices at the time in the city of Puebla, and that when seized by the order of General Lane the market value of said tobacco was at least the sum claimed by said Gordon & Murray, the last purchasers.

And your petitioner humbly and respectfully claims, that the said sale of tobacco was made publicly in open market; that the purchase was made in entire good faith; that the purchase money was paid, and the article delivered; and that the contract has been rescinded, and the property seized, without any fault on the part of your petitioner; and that he is entitled to compensation from the United States for the damages which he has sustained by the act of their own officers; that he has been subjected to the necessity of making full compensation to subsequent purchasers for the losses sustained by them successively, as well as to the direct injury arising from annulling the contract; and that for such loss and damages he should be fully indemnified; and, in accordance with the practice of the government in similar cases, that interest be allowed and such other damages as he has actually sustained.

Your petitioner would present the following statement of the particulars of his claim:

The claim of Gordon & Murray.....	\$3,000 00
The claim of Gomio & Co.....	3,500 00
The claim of Abadie.....	1,000 00
Amount for which petitioner is responsible to third persons before Mexican tribunals.....	\$7,500 00
Amount lost by petitioner.....	4,500 00
Due by United States to J. A. Port in consequence of the annulment and sale.....	\$12,000 00
The petitioner further claims:	
1. Storage and unpacking of tobacco, and interest on \$12,000 by him disbursed.....	711 00
2. Expenses in Mexico during four months.....	600 00
Three voyages to the United States, and expenses therein for three years.....	5,000 00
	\$18,311 00
Deduct one month's interest on \$8,000 repaid to petitioner.....	40 00
	<u>\$18,271 00</u>

Your petitioner would further state, that in the year the foregoing claim was presented on his behalf to the Department of State

of the United States, by the French Minister at that time accredited to the Government of the United States, and that said claim was denied on behalf of said Government of the United States by Hon. John M. Clayton, then the Secretary of State.

That your petitioner presented his petition to the Congress of the United States for the allowance of said claim during the 31st Congress; that the same was referred to the Committee of Foreign Affairs in the House of Representatives, which committee, on the 3d day of March, 1851, made an adverse report on the same, which report was by order of the House laid on the table and ordered to be printed.

Your petitioner would further state, that he is the sole owner of said claim, and has assigned no part of the same to any person.

Your petitioner therefore prays your honors to inquire into the matters set forth in the foregoing petition, and, on finding the same to be true, to grant such relief as to law and justice may appertain.

JOHN A. ROCKWELL,
Counsel for J. A. Port.

Statement of claim of J. Alexis Port.

1st. The claim of Messrs. Gordon & Murry.....	\$3,000 00
2d. Claim of Mr. Gomio & Co.....	3,500 00
3d. His own claim.....	1,000 00
To these.....	\$7,500 00
For which Mr. Port is responsible to the Mexican tribunals, we must add, what he himself lost.....	4,500 00
Due by the United States to Mr. Port in consequence of the annulment of the sale which their agents had made	11,000 00
Mr. Port further claims:	
1. Storage and weighing of tobacco, interest on the \$12,000 by him disbursed during nearly three months	711 00
2. Expenses in Mexico during four months.....	600 00
3. To voyages made to the United States, and expenses therein for three years.....	5,000 00
Total.....	\$17,311 00
Deduct interest on \$8,000, which interest was repaid to Mr. Port by order of board of officers at Puebla, one month.....	40 00
	<u>\$17,271 00</u>

IN THE COURT OF CLAIMS.

J. ALEXIS PORT *vs.* THE UNITED STATES.*List of Papers filed on behalf of petitioner, by J. A. Rockwell, counsel,
June 23, 1858.*

1. Stipulation of Mr. Blair, esq., waiving objection to receiving in evidence papers in the case named below, page 8.
2. Petition to Congress, marked No. 2, pp. 9 to 19.
3. Papers marked No. 3, pp. 20 to 36.
4. Papers marked No. 4, pp. 37 to 69.
5. Papers marked No. 5, pp. 71 to 111.
6. Papers marked No. 9, pp. 112 to 113.
7. Papers marked No. 10, pp. 114 to 150.
8. Papers marked No. 11, pp. 151 to 167.

IN THE COURT OF CLAIMS.

On petition of J. Alexis Port.

Agreement. I have objection to the reading in evidence papers marked Nos. 2, 3, 4, 5, 9, 10, and 11

M. BLAIR,
Solicitor United States.

WASHINGTON, *June 3, 1857.*

*To the Senate and House of Representatives of the Congress of the
United States.*

The memorial of J. Alexis Port, of the city of Puebla, in the Republic of Mexico, respectfully represents, that he is a French citizen, and has resided in said city of Puebla as a merchant of reputable and unblemished character for more than fourteen years.

While the United States army was in the possession of the said city of Puebla, in pursuance of the order of Col. Thomas Childs, then acting as civil governor of Puebla, Capt. Charles R. Webster, U. S. army, and acting quartermaster, advertised for sale at public auction, 500 bales of tobacco. The following is the statement of Capt. Webster, with a copy of the advertisement:

"I certify that I advertised the sale of tobacco on the 16th October for the 19th October, by causing the notes (notices) of such sale, in Spanish and English, to be publicly fixed and placed on the corners of the principal streets and thoroughfares of this city; and I further certify that the following is a true copy of the original in Spanish, and was taken from some public place after the sale of said article.

"CHAS. R. WEBSTER,

"Captain, and Assistant Quartermaster."

The following is the translation of the advertisement:

"On the 19th inst., there will be sold at public auction, at three o'clock in the afternoon, at the quartel San Jose, 500 bales of tobacco."

Your petitioner became the purchaser of said tobacco, at \$24 per bale, amounting to the sum of \$12,000; and paid for the same the sum of \$8,000 in cash, and by a credit to the United States, in account with him the sum of \$4,000, the United States being at the time indebted to him for supplies furnished the army.

The following is the certificate of Capt. Webster:

“ASSISTANT QUARTERMASTER’S OFFICE,
November 10, 1847.

“I certify that, on the 21st of October, I sold, per order of Colonel Childs, 500 bales of tobacco, at \$24 per bale.”

“CHAS. R. WEBSTER,
Captain and assistant Quartermaster.”

Your petitioner would further state, that on the 27th of the same month of October, he sold the said tobacco to Señor Don Juan Abadie, merchant of said city, at \$33 per bale, amounting in all to \$16,500.

On the 13th November, 1847, Señor Abadie sold the same tobacco to Messrs. Gomio & Co., of the city of Mexico, for \$35 per bale, amounting to \$17,500, accompanied with a warranty that the tobacco was his legitimate property, and that he would present the proper documents and certificates of the American authorities, so that the sale might have no obstruction, and the property might be removed at pleasure, without any impediment whatever, and that the seller should be responsible to clear of any difficulty which might arise.

And on the 15th of November, Messrs. Gordon & Murray purchased this tobacco at \$48 per bale of 214 lbs., amounting to \$21,000, for which they paid in cash, and the seller warranted the sale against any difficulties which might arise.

Copies of the bills of sale, showing the transfers as when duly authenticated, accompany this memorial, to which the petitioner begs leave to refer.

Your petitioner would further state, that after the sale by him of the tobacco, purchased as aforesaid, he was informed that the tobacco was claimed by a merchant of Puebla, of the name of Domercq and on the 11th of November, 1847, General Worth addressed a letter to Colonel Childs on this subject, in which he remarks: “I now learn that by your order the tobacco has been taken out of the hands of Hargous’s agent and resold. If so, whatever may have been your necessities in the way of funds for public purposes, a decided wrong has been done to the purchasers,” &c.

On the 17th of November, 1847, by order of General Lane, a board of inquiry, consisting of four officers of the army, was convened at Puebla, for the purpose of examining into the matter. They had before them a communication from Mr. Domercq and your petitioner, and examined as witnesses Colonel Childs and Captain Webster. The majority of the board declare that “they are of opinion that the 500 bales of tobacco sold by Captain Webster to Mr. Port, was not at the time of the said sale the property of the United States, and award the possession and ownership therefore to him, the said Domercq, and that the quartermaster, Captain Webster, pay to Mr. Port \$8,000, with

interest from the date of its payment to him, and cancel the credit of \$4,000 to the United States, in its account with Port for clothing, &c., supplied."

On the 30th of said November, Captain Webster addressed a letter to General Lane, stating that Mr. Domercq informed him that the last buyer of the tobacco refused to give up the key, and requests that he will send an officer with a file of men to see that he has possession of what the court has decided was his property, and put him in quiet possession of the same without any disturbance; and in pursuance of this request the tobacco was forcibly seized and delivered to Mr. Domercq.

It is not contended, as your petitioner is aware, that at the time of the several sales and transfers of the tobacco as aforesaid, that the price at which the tobacco was sold was above the fair market price at that time, in the city of Puebla, nor that it was not until when seized by the order of General Lane, at least the sum claimed by Messrs. Gordon & Murray, the last purchasers.

It appears from the statement of Mr. Domercq himself, that after the purchase of the tobacco by your petitioner, and before the sale by him, that he offered to your petitioner to purchase it at \$31 or \$32 per bale; and General Lane, in an order confirming the doings of the board of inquiry, directs:

"3. That the quartermaster, Captain Webster, cancel the credit of \$4,000, now at the credit of the United States, against Port, on his books.

"4. That the quartermaster, Captain Webster, retain the sum of \$8,000 paid to him by Port until evidence to his satisfaction shall have been furnished that all the purchasers subsequent to Port shall have been refunded the amount respectively paid by them in the sale and resale of said tobacco.

"5. It is made the special duty of the quartermaster, Captain Webster, to give immediate notice to parties interested, and to see this order carried into effect."

In view of the foregoing fact, your petitioner humbly and respectfully claims that he is entitled to compensation from the United States for the damages which he has sustained by the acts of their own officers; that as he has been subjected to the necessity of making full compensation to the subsequent purchasers for the losses sustained by them successively, as well as to the direct injury arising from annulling the contract of sale. That for such loss and damage he should be fully indemnified; and as it is understood to be the practice in demanding of other nations redress for injuries to its citizens, and is just in itself that interest be allowed, and such further damages as he has actually sustained.

Your petitioner most respectfully claims that the title acquired by him was a valid title, and would be sustained before any court acting under the law of nations; that the seizure and sale of the property of an individual domiciled in Mexico, during the war with that nation, would vest the property in the purchaser; that it was not the duty nor the right of your petitioner to sit in judgment upon the acts of the commander of the American forces, nor to determine to what ex

tent he should exercise the acknowledged rights of a belligerent; that the question as to the degree of mildness or severity with which the law should be prosecuted was a national question, and that your petitioner was authorized to purchase property publicly offered for sale by the commander of the American forces whether the same had been seized by him as the property of the nation or of individuals.

Your petitioner respectfully claims that if the former owner of the tobacco in question, Mr. Domercq, should have instituted a suit before the courts of the United States against your petitioner for the value of the tobacco, on the ground that the seizure and sale had been illegal and void; that upon no principle could the claim be sustained; still less is it consistent with justice and good faith for a nation thus to annul, without just compensation, its own contracts.

It is apparent, too, as your petitioner supposes, that the same view was entertained by all parties at the time this sale was made. Even the former owner of the tobacco himself regarded the title of your petitioner as valid, and proposed to purchase of him the tobacco which he had formerly owned.

Now, all the proof in this case, it is perfectly apparent, as your petitioner insists, that the sale was made publicly in open market, and that the purchase was made in entire good faith; that the purchase money was paid and the article delivered, and that the contract has been rescinded without any fault on the part of your petitioner.

As there is not the slightest proof of any kind, or ground for suspicion of any unfairness on the part of your petitioner, he might safely rest his case on the facts above stated, which are proved undeniably by the evidence accompanying this memorial.

But Col. Thomas Childs, United States army, and then governor of Puebla, in his testimony before the board of officers, has gratuitously and unjustly assailed the reputation of your petitioner; and, by the expression of a *suspicion* of a fraudulent collusion between your petitioner and his own secretary, has not only greatly prejudiced the claim of your petitioner for redress, but for the breach of contract, but has assailed his reputation, and among them to whom he was unknown, has injured his character for integrity, never before questioned.

Your petitioner feels called upon, by a regard for his reputation, to repel the imputation, although based merely on suspicion, and to show that it is not only made without proof, but to prove negatively the *suspicion* to be wholly unfounded.

Col. Childs, says: "Witness is of opinion that the present claimant, Port, was in collusion with the secretary and interpreter, in the tobacco purchase, and that both Port, the secretary, and quartermaster, have been engaged in an infamous attempt to speculate on the tobacco, to the injury of the former purchaser, Domercq. His reason for this opinion is, that so large a quantity of tobacco could not have been sold in Puebla without the fact being known to all the tobacco dealers. The secretary and interpreter died subsequently to the sale made by the quartermaster. Has every reason to believe that the secretary and interpreter was to receive two dollars per bale from the last purchaser, Port; and has been assured that \$1,000 was

due to the estate of Wingierski *vs.* Port, which witness has not yet collected, as he has been waiting the issue of the matter now pending before the court. Witness has no positive knowledge that Port was cognizant of the original sale."

Never were such serious charges made without the pretence of any proof.

The only ground for this *opinion* is, that "so large a quantity of tobacco could not have been sold at Puebla without the fact being known to all the tobacco dealers."

In the first place, it is proved by a number of witnesses that at the time, and before and after that sale was made to Domercq, the petitioner was absent from Puebla. In the next place, his business was not that of a tobacco dealer. But your petitioner respectfully but confidently contends that it is entirely immaterial whether he did or did not hear that this tobacco was the property of Domercq at the time it was siezed by the officers of the United States. It appears from the statement of Col. Childs himself, that "at that time there was no money in the quartermaster's or any other department;" and Gen. Worth, in his letter of the 1st instant to Colonel Childs, understood that the property had been seized for the purpose of supplying the necessary funds. He says, "whatever may have been your necessities in the way of funds, a decided wrong has been done the purchaser," &c.

Doubtless Col. Childs considered the necessity of the case justified him in seizing and selling private property in order to supply the necessary funds.

Certain it is that the United States publicly and forcibly did seize the private property of Domercq, and after due notice publicly sold it. Whether this act of seizure and sale of the property of an individual is justified by the circumstances, is not important. It surely is a strange charge to make by the officer seizing and selling the goods, that the purchaser, if he knew who the former owner had been, is guilty of fraud.

But Col. Childs charges his secretary and interpreter with fraudulently and falsely interpreting the communications from Mr. Domercq to him. It is no part of the duty of your petitioner to vindicate the character of this person, who at the time when the charges were made was drunk; but it is proper to observe that Col. Childs, in a communication to Capt. Scott, acting assistant adjutant general, of the 12th October, 1847, published in the "Flag of Freedom," of the 20th October, the very time of these transactions, says: "To my staff, Lieut. Maddox, acting adjutant general, and my secretary, Mr. Wingierski, I am indebted for most valuable services. They were not only employed in their official duties, but commanding troops, and by day and night were most active and zealous. I cannot sufficiently thank these gentlemen for their services."

And on the 13th October, 1847, in another communication addressed to the same officer, published in the "Flag of Freedom" of the 15th January, 1848, he says: "To Mr. Wingierski, secretary and translator, I am indebted for valuable services. Mr. W., in addition to his appropriate duties, conducted the operations of the spy company,

and through his suggestions and active exertions, I received most valuable information, and many successful expeditions of spies into the city were made. Mr. W. conducted the detachment on the roof of my quarters, and was the first man wounded. From his after efforts his wound proved severe and painful; still he performed his various duties night and day, and is worthy of my approbation."

The reasons of Colonel Childs for supposing that this person had been guilty of fraud are not given, nor any fact to sustain the charge; but whether the charge against the deceased secretary is well or ill founded, in no way affects the character of your petitioner.

Although Colonel Childs says that he has "reason to believe" that there was a corrupt agreement between your petitioner and his secretary, by which the secretary was to receive \$1,000, and that he waited the issue of the matter then before the court before collecting it of your petitioner, yet he has never made any such claim of your petitioner, nor shown the slightest reason for his belief of this most groundless imputation.

Not only is there the absence of the slightest evidence to show any collusion or connexion of any kind between the secretary and your petitioner, but the testimony is direct and positive that at the time when these communications were made by Mr. Domercq through the secretary, he was and had been long before that time absent from the city of Puebla, and returned to that city from Atlisco on the 14th day of October, having been absent from Puebla between that time and the 10th of September previous.

In addition to this, your petitioner would refer to the testimony of Captain Webster, who was personally conversant with the entire transaction, as given before the board of officers. He says: "Witness thinks there could have been no dishonest collusion between Port and Wingierski; has had many transactions with Port, and always found him upright and honest in his dealings."

Your petitioner, in order to sustain his reputation as a man of integrity and a merchant of reputable standing, asks the attention of Congress to a certificate signed by a large number of the principal citizens of Puebla, and duly authenticated. They say "that since the year 1836, when Mr. Alijo Port, a French citizen, settled in this city, he has observed a very proper conduct, exhibiting in all his commercial transactions an honor, legality, and good faith, without the slightest fault being perceptible in him."

And after all these transactions, and nearly a month after the approval of the doings of the board by General Lane, that officer causes the following letter to be written:

"PEUBLA, *December* 14, 1847.

"SIR: I am instructed by General Lane to recommend to the General-in-chief Mr. Alexander Port, a Frenchman, and resident of this city. He has been very useful to the troops at this place in procuring clothing, forage, &c., and has ever proved a firm friend of the Americans. Private business requiring his presence in Mexico, Gen.

Lane deems it his duty to recommend him to the notice of the General-in-chief.

"I am, very respectfully, your obedient servant,

"THOS. J. WHIPPLE.

"To Captain H. L. Scott,

"A. A. A. General."

Your petitioner regrets that the wanton attack which has been made upon his character has rendered necessary so full a vindication of it from very serious but entirely groundless charges. He regrets still more that a private affair of his own, of comparatively so small a pecuniary amount, should have been the occasion of interrupting in the least degree the most friendly feeling between the representatives of the two nations.

He relies solely upon the justice of his claim for redress, and trusts that Congress will give an impartial, candid, and just examination of it, and grant to him such measure of justice as they award to the humblest of their own citizens.

J. A. PORT.

WASHINGTON, *April* 16, 1850.

NOTES.—No. 1.

[Translation.]

PUEBLA, *October* 27, 1847.

Senor Don Juan Abadie, merchant of this city, to pay to A. J. Port by the arrival of the first conducta,) DR.

To 500 bales tobacco at \$33..... \$16,500

No. 2.

[Translation.]

PUEBLA, *November* 13, 1847.

El Senor Don Juan Abadie, of Puebla, has sold, by my intervention, to Mr. M. Munguiro, agent of Messrs. Garcia & Co., of Mexico, the following, delivered in the city of Puebla and the full amount paid in Mexico, with drafts of the purchasers, (follows drafts:)

The 500 bales tobacco of Orizaba are satisfactory to the purchaser; each bale of 200 pounds, at \$35 00 each, \$17,500.

The seller assures that the said tobacco is his legitimate property, and will present the proper documents and certificates of the American authorities, so that the sale may have no obstruction, and the property may be removed at pleasure, without any impediment whatsoever; the said seller to be responsible to clear up any difficulty which may arise.

No. 3.

PUEBLA, *November 15, 1847.*

Sold to Messrs. Gordon & Murray 500 bales tobacco, marked A. C. 1 to 500, at \$48 per bale of 214 pounds, say \$20,000, which he has paid me in cash, and I warrant the sale against any difficulties which may arise.

No. 4.

PUEBLA, *November 19, 1847.*

I have sold to Dr. V. del Poso, of Mexico, \$500 bales tobacco at \$48 = \$24,000; which sum he has fully satisfied in silver coin; he having received and being satisfied with the said tobacco, which he received through the broker, Jose Antonio Bueno.

No. 5.

Duplicate.--[Translation.]

PUEBLA, *November 16, 1847.*

DEAR SIR: The bills of exchange (1st and 2d) which I have remitted to you for \$17,500, drawn by Mr. Munguiro on Messrs. Garcia & Co., and endorsed by me, to your order, are hereby annulled, until some difficulties are arranged, which have occurred in this business.

I have, therefore, received these bills, for which reason I request you will do me the favor to have them delivered (the 1st and 2d) without the receipt of Messrs. Garcia & Co., returning to these gentlemen the aforesaid sum of \$17,500, in case they have paid it, or any other sum delivered by them, at the receipt of this letter.

I remain, respectfully, your obedient servant,

JUAN ABADIE.

Mr. GIL ORIENT, *Mexico.*

No. 6.

[Translation.]

PUEBLA, *October 31, 1847.*

SIR: In answer to your letter of 30th instant, I have to say that on the 27th of the same month I sold to Mr. John Abadie, of this city, the 500 bales tobacco.

Respectfully, your obedient servant,

J. A. PORT.

Capt. C. WEBSTER,

Assistant quartermaster U. S. Army.

No. 7.

Copy of the protest made before the national and public notary, Don José Mariano Torres Torija, in Puebla, on the 30th of Novem-

ber, 1847, by Mr. Juan Alejo Port, in order to demand damages and costs which have been occasioned to him by the failure of fulfilment of the contract of public sale which was made to him of five hundred bales of tobacco, as is within set forth :

In Puebla, on the thirtieth of November eighteen hundred and forty-seven, before me, the notary, and witnesses, M. Juan Alejo Port, a native of France and resident of this capital, whom I certify that I know, requested me to see, as in fact I did see, if by the receipts from the landlord, which are in his possession, it appears that in the house of Don Diego Cervantes, number seven in the street del costado de San Pedro, in this city, he holds, by renting, some warehouses, which he occupies with his mercantile effects ; and that I should proceed to certify, as I do certify what had been done at his doors, and what in fact occurred namely : that I saw, at half-past three o'clock this afternoon, the two doors of those warehouses open, and one (which is the small one on the left hand, leading to them, situated on the side of the court facing the east) broken in the wood-work near the place where the lock is, and the rails torn up or wrenched from the wood, which doubtless preceded it ; perceiving that it was forced, so as to allow of its being broken open, and that from those warehouses were being removed carts-full of bales of tobacco, and at the entrances of the same were some uniformed and armed soldiers of the North American army sustaining or guarding that removal or extraction. This truth being held as proven, and he truly states that those occurrences took place in the house of Mr. Port, and with the goods which were there existing, the same person requested me that, upon that fact, Don Carlos Dujah, doctor of medicine, Don Antonio Latassie, merchant, and Don Altonzo Neron, warehouseman, might depose before me, under the religion of an oath, as they did in fact do, and being present they did unanimously say : that at a quarter before one o'clock this afternoon an officer and eight soldiers, North Americans, doubtless by superior orders, went to break open those doors and take out the bales of tobacco which were found therein, as was publicly and notoriously seen, this proceeding being, in their opinion, a grievous injury to Mr. Port, since they knew perfectly well that, as the legitimate owner of that tobacco, he was proceeding to sell it to Mr. Juan Abadie, he having to fear the consequences of the failure to fulfil or complete the respective contracts. They added that they were over age, and that the generalities of the law do not touch them, ratfying their deposition in form ; in virtue whereof, and of what is by me certified as seen, Mr. Port stated to me, that being called together publicly by hand-bills issued by the North American quartermaster on the sixteenth day of October last to bid for five hundred bales of tobacco ; among other bidders, deponent was one, to whom was sold that number of bales at twenty-four dollars, and the whole amounting to twelve thousand dollars, which he produced, giving eight thousand on the twenty-first of said month, and four thousand on the fifth of November, and receiving the goods publicly from the said quartermaster on the twenty-first, twenty-second, and twenty-third of the same October. That, securing his ownership by a contract as public as, in his opinion, it was solemn and legal, the price being paid, and he

being put in possession of the goods, he made sale of them to Mr. Juan Abadie, merchant, of this town, for the price of sixteen thousand five hundred dollars, at thirty-three dollars per bale, according to the account which I saw.

That, afterwards, the quartermaster, on the thirty-first day of said October, wrote to him advising him not to dispose of said tobacco until further order; and, finally, the civil and military governor of this post, by a decision made in military tribunal, ordered him to restore the tobacco and to be reimbursed the price which he gave for it, affirming that he had done the same towards Abadie, and the latter with the person to whom he had sold it; that these successive reimbursements were made, but the appearer could not, of himself, restore the tobacco, because the keys of the warehouse were in the hands of the agent of Messrs. Garcia & Co., of Mexico, as an evidence of the delivery and abandonment of the ownership, without the account and charge of the first litigant being still current, who could not either dispose of them at the time, the contracts being held as closed, and this gave rise to the breaking open of the doors and the forcible removal which he has deposed and certified; so that, notwithstanding the blamelessness of which he speaks, not only has the failure of benefits which he would have derived from the contract not inured to him, but he has incurred the obligation of consequences, for which his purchaser looks to him, no less than the smaller damage to the building and the expense it has caused him, he believes it to be essential to him to make against whom it may concern the proper claim; for which purpose, discarding uncertain date, I certify the good faith of his proceedings, and, being persuaded of its justice, by the present, in due manner and form, and for the ends which may be proper in law, from this time forth I protest once, and as often as may be necessary, against the illegality with which, the consequences being considered, the alienation has been made of his property by the said quartermaster: because of the sentence which declared unsubstantial the auction and sale, and the contract to be rescindible, having been injurious to him; because of the haste, oppression and force with which the tobacco was taken from the warehouses belonging to him; and, finally, for everything that has occurred in the matter in violation of his rights—the whole with the object of demanding, in the manner, when, where and from whom it may concern, both the four thousand five hundred dollars of profits which he had gained, and the one thousand dollars which he failed to realize, and which Mr. Abadie has demanded of him, as being those which he gained in his trade with Messrs. Garcia & Co., save those which those gentlemen claim against him, (conformably with the bill of contract which he showed to me,) and such other damages, injuries, and costs, as have been caused to him and shall arise, until entirely satisfied, saving as, he does, his actions and appeals of all kinds; with whatever of fact and right may favor him, he solemnizes this protest with the oaths, stipulations, and requisites which may be required, and which may make it legally efficacious, before the proper authorities; desiring that they, and especially those of the United States, may be pleased in the same manner to supply any material defect which may be noted, and requesting that, in order to

make before the same and any other which may be of importance to him his subsequent uses, there may be issued to him at the times he shall ask for it a faithful copy of this protest, which he signed with the declaring witnesses, Don Antonio Hernandez, Don José Maria Torres Toledo, and José Maria Irrijano, of this town, being assisting witnesses. I certify Alfonso Neron, Carlos Dufat, Antonio Latassie, J. Alejo Port. Before me,

JOSE MARIANO TORRES.

This is the original copy made the day of its date at the request of Mr. Port, on four leaves of common paper, and its draft appears in the current protest in my possession, to which I refer. I certify,

JOSE MARIANO TORRES. *N. and P. N.*

No. 8.

[Fourth Tribunal.]

PUEBLA, *December 6, 1847.*

Mr. Juan Abadie will appear at ten o'clock, with his surety, in order to make a settlement for money, which Mr. Manuel Munquira requires of him, it being understood that, if he does not appear, the judgment will be considered as confessed conformably to law, and the certificate will be given.

REYES.

Second citation.

[5th Seal.]

(Stamp.)

[Half real.]

I, citizen Pedro de Leon Valasquez, Regidor de cano del I. A., of this capital, in which I act in compliance with the law, with assisting witnesses, as there is no notary public:

Certify in due form that on the day of the date hereof, before me the undersigned judge, appeared the French citizen Alejo Port, merchant of Puebla, requesting that the three witnesses whom he hereby presents may be examined, so that under the religion of an oath they may declare if the party interested has been a citizen of this place; in what year he became so, and how long he remained there; for which object, and in order to comply with his request, I directed him to retire, and having present the first witness, I administered to him the oath in due form that he should answer truly to what should be asked of him, and being so questioned, in a general manner, he said that his name was Ignacio Campos; that he is a native and resident of this capital, a widower, a merchant, and aged fifty-six years. Being questioned as to the minutia to which Mr. Alejo Port refers, he said that he knows it to be true that said gentleman was in this town from the 2d of May to the 30th of July, in the year 1847; that what he has

set forth is all he has to say, and which, in testimony of its truth, he signed at the foot with me and the assistants.

The first witness having retired, the second appeared, and, having been duly sworn, he promised to speak the truth as to what should be interrogated him; and having been questioned in a general manner he said his name was Jose Juentes de Maria; that he was a Spaniard, a resident of this town, married, a merchant, and aged fifty years. Being questioned in the same manner as the former, he said: that from the 2d of May, 1847, until the 30th of July of the same year, the aforesaid Mr. Alejo Port was in this town, and lodged in his own house, transacting business appertaining to his commercial pursuits; that what he has set forth is the truth, and for proof hereof he signed it before me and the assistants.

In continuation, and the second witness having retired, the third one was brought before me, to whom I administered the usual oath, and by which he promised to speak the truth as to what should be asked of him, and being questioned in a general manner, he said that his name was Miguel Hernandez; a native and resident of this town; married, a merchant, and aged twenty-eight years. Being questioned in accordance with the wishes of the party interested, he said that he knows that Mr. Alejo Port came to this town on the 2d day of May, in the year 1847, and remained here till the 30th of July of the same year, at which period he closed the business for which he came, which had relation to commercial affairs; that he has no more to say on the subject; that he ratifies what he has set forth, signing with me, &c.

Inasmuch as the above statements, the desire of the party interested is satisfied, at his request, and for the uses which may be proper for him, I ordered the present to be extended, which the witnesses signed with me and the assistants, in Chietta, on the 23d day of the month of August, in the year 1849.

PEDRO LEON VALASQUEZ.
MIGUEL HERNANDEZ.
ING. CAMPOS.

JOSE FUENTES DE MARIA.

JESUS MARTIERO.
JN. FRANCISCO MACORA,
Assistants.

[L. S.] In this perfecture is recorded the contents of the foregoing.
JOSE M. PAVON.

MATAMORAS, *August 24, 1849.*

[4th Seal.]

(Stamp.)

[One Real.]

I, citizen Blas Paredes, 2d constitutional alcalde of this city, certify, in the best form of law that is permitted to me: that the French citizen Alejo Port, a resident and merchant of Puebla, having appeared before me requesting that the witnesses whom he in the act presented might be examined to prove:

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1st. That on the 28th day of the month of April, 1847, he arrived in this city, whence he departed on the 30th of the same, bound to Chietla.

2d. That on the 30th day of July of the same year he returned from that place, and afterwards went to Puebla.

3d. That on the 10th day of September he returned to this city, stating that he had left that place on account of the state of siege in which it was; and

4th. That on the 14th day of October of the same year, he returned to the said city of Puebla, with a passport issued by the Mexican General Citizen Juan Alvarez.

Conformably with his request I ordered one of the witnesses presented to be examined, who, having been duly sworn, stated that his name was Alofo Lelierre, a native of Paris and a resident of this city, married, a merchant, and aged forty-seven years, and being made acquainted with four points above referred to, he declared that what was contained in them was true.

A like deposition under the religion of an oath was given to Angel Garcia, adding that such was his name; that he is a native of Jalapa, a resident of this city, unmarried, a merchant, and aged twenty-four years.

The third witness, who was Mariano Falcon, after the formalities prescribed by law, stated that he was so named; that he is a native of Puebla, a resident of this city, married, employed in the collection of the national revenue, and aged forty-five years; and being like the others informed, he said, that although he cannot with precision testify what might have been the dates of the arrival and departure from this city of the person whom he is present to declare about, yet he knows that it was about that period, and if there was any difference it would be only two or three days.

Their respective depositions having been read by the witnesses they affirmed to them and ratified their contents, and the party interested not having any other to present, and at his request, I extend the present in Atlisco, this 25th day of the month of August, 1849, the deposing witnesses and assistants with whom I act, for want of a notary, signing with me.

BLAS PAREDES.
AO. LELIERRE.
ANGEL GARCIA.
MARIANO FALCON.

LOUIS CARDENAS.
RUMON F. BRAVO,
Assistants.

The foregoing certificate is proven to me to be extended by the 2d [L S.] constitutional of this city, and that the signatures which attest it are those which the parties who testify are accustomed to use. Date as above.

JE. ANTO. SENANO.

[4th Seal.]

(Stamp.

[One Real.]

Petition.

I, the undersigned notary, certify that Mr. Jose Alejo Port presented to me a statement of the following tenor: I, Alejo Port, a French citizen, whose letter of protection (*carta de seguridad*), I do not present, having been absent from the Republic, protesting that I will exhibit it as soon as I receive it, before you, with the proper protests, say, that it being necessary to prove the days when I left and returned to this capital when it was invaded by the North American army, you will be pleased to order that the witnesses present be examined under the religion of an oath, conformably with the following interrogatory: First, let them state their names and other generalities; second, let them state if, on the 27th of April, 1847, I left this capital for Atlisco, whence I returned the 1st of August of the same year; third, that on the 9th of September following, I again left this city for Atlisco, on account of the siege by the Americans; fourth, that I returned to this city on the 14th of October of the same year; fifth, let them state if it is true that on the 14th of December of said year I left this city for the capital of Mexico; sixth, let them state if it is true that I returned to this city from said capital on the 11th of June, 1848. This information being received, in all sufficiency, which I protest to be alone favorable, you will be pleased to order that the original be given to me for the uses that may be proper for me. I request you to provide as I desire.

JOSE ALEJO PORT.

BUEBLA, *October 5, 1849.**Decree.*PUEBLA, *October 5, 1849.*

Let the information offered be taken, and let it be delivered to Mr. Alejo Port as he requests. Thus the second *alcalde* of the capital ordered before me, which I certify.

FRANCISCO CASO.

Before me:

JUAN PEDRO NECOECHEA.

On the 6th of the same, appeared as a witness for the information which is ordered to be received, Mr. Elias Lamarque, who being duly sworn and interrogated conformably with the foregoing petition, said, to the first question, he is named as stated; he is a native of France, and resident of this city; a bachelor, aged thirty-five years; an apothecary, and that the generalities of the law do not affect him. To the second, that he knows, and is certain, that on the 27th day of April, 1847, Mr. Alejo Port left this city for Atlisco, whence he returned on the 1st day of August of the same year. To the third, that its contents are true. To the fourth, that on the 14th day of October, of the said year 1847, he returned to this city. To the fifth, that he again left this city, bound for the capital of Mexico, on the 14th day of December, 1847. To the sixth, that he knows that the said Mr.

Alejo Port returned to this city from the capital of Mexico on the 11th day of June of last year, 1848. That what he has set forth is public and notorious, and the truth, by his oath by which he ratified when it was read to him as his deposition, which he signed with the judge before me, which I certify.

LAMARQUE.

Before me :

JUAN PEDRO NECOECHEA.

Afterwards appeared as a witness, Mr. Miguel Garcia, who being sworn and questioned as the former, said, to the first question, that he is named as stated, a resident and merchant of this city, married. and aged twenty-three years; that the generalities of the law do not affect him in the matter which he presents. To the second, that he knows that on the 27th of April, 1847, Mr. Alejo Port left this city for Atlisco, having returned the 1st day of August of the same year. To the third, that the contents of that question are correct. To the fourth, that it is also true. To the fifth, that he knows and is certain that the said Mr. Alejo Port, again left this city for the capital of Mexico on the 14th day of December of the said year, 1847. To the sixth, that he returned from that capital to this city on the 11th day of June, 1848. That what he has set forth is public and notorious, and the truth by his oath by which he ratified this his deposition when read to him, which he signed with the judge before me, which I certify.

MIGUEL GARCIA.

Before me :

JUAN PEDRO NECOECHEA.

Immediately afterwards appeared as a witness, Mr. Manuel Zetina, who being sworn and interrogated as the former, said, to the first question, that he is named as stated; a native and resident of this city; a merchant, married and aged thirty-eight years, and that the generalities of the law do not affect him in the matter which he presents. To the second, that it is true that on the 27th day of April, 1847, Mr. Alejo Port left this city for Atlisco, having returned the 1st of August of the same year. To the third, that he knows that the contents of this question are true. To the fourth, that it is also true. To the fifth, that in the same manner the contents of that question are true. In the sixth, that it is true that on the 11th day of June, 1848, Mr. Alejo Port returned to this city from the capital of Mexico. That what he has set forth is public and notorious, and the truth by his oath by which he ratifies this declaration on its having been read to him, which he signed with the judge before me, which I certify.

MANUEL ZETINA.

Before me :

JUAN PEDRO NECOECHEA.

Record.

In two leaves these proceedings are delivered to Mr. Alejo Port, in fulfilment of what was ordered.

NECOECHEA.

PUEBLA, October 6, 1849.

At the request of the party interested I make the present, which agrees with its original to which I refer, in Puebla, this 8th of October, 1849, Don Antonio Hernandez, Don Joaquin de Unutia, and Don Jose Maria Vasquez of this vicinity being witnesses.

JUAN PEDRO NECOECHEA.

Notary Public.

We certify that the signature and mark which precede are these of Don Juan Pedro Necoechea, notary public, and of the oldest notariat of the superior tribunals of this State, faithful, legal, and of every confidence; and therefore, to whatever they certify, is and should be given entire faith and credit, judicially and extra-judicially. In testimony whereof, we make the present in Puebla, on the 8th day of October, 1849.

JOSE MORIA FELLO.

JOSE RAF'L OREA.

GREGORIO SANDOVAL.

[4th Seal.]

(Stamp.)

[One Real.]

I, Lorenzo Fernandez, commissary general of the State of Puebla, in the Mexican Republic, certify: that the French citizen Jose [L. s.] Alejo Port, a resident and merchant of this city, since the year 1836, has made several contracts with the supreme government, and this commissariat general of clothing for troops, complying exactly in them with the honor and punctuality which characterize him; I also certify that his conduct in public has made him always worthy of particular esteem. In testimony whereof, at the solicitation of the party, I give the present in duplicate, in Puebla, this 8th of October, 1849.

LORENZO FERNANDEZ.

[4th Seal,]

(Stamp.)

[One real.]

I, Jose Maria de Guadalupe Pavon, prefect of this capital and department, certify: that Mr. Alejo Port, a French citizen, has [L. s.] exhibited a passport which was issued to him by the supreme government of the State, of which a record was made by the prefecture which is now under my charge, and at that time under charge of Colonel Rafael Espinosa, which document is dated the 18th of December, 1838, residing then in this State since the year 1836, during all of which period the said Mr. Port has observed, according to said prefecture's notice, the best conduct and fidelity in all his contracts which as a merchant he has made in this place.

And at the request of the party for the purposes that may be useful to him, I give him the present in duplicate in Puebla, October 10, 1849.

JOSE MARIA D. G. PAVON.

[4th Seal.]

(Stamp.)

[One Real.]

I, the secretary of state of the supreme government of the free and sovereign State of Puebla, certify: that Mr. Alejo Port, a French

citizen, by means of a statement made before the 2d alcalde of this capital, is accredited by the sworn deposition of three individuals engaged in commerce, in his good conduct and fidelity in his contracts; circumstances which are also known to this government. In virtue whereof, and by order of his excellency the governor, and for the uses that may be valuable to him, I give the present in Puebla, this 15th of October, 1849.

[L. s.]

JOSE M. FERM.
Secretary.

[4th Seal.]

(Stamp.)

[One Real.]

We, the undersigned, resident merchants of this capital, certify as far as may be and the law permits, that since the year 1836, when Mr. Alejo Port, a French citizen, settled in this city, he has observed a very proper conduct, exhibiting in all his commercial transactions an honor, legality, and good faith, without the slightest fault being perceptible in him. We give the present at the request of the party interested, for the uses that may be proper for him, in Puebla, this 16th day of October, 1849.

Wischey & Co.
Vr. Echerique.
José E. Mujica y Osorio.
Joaquin de Hard y Tumarez.
Man'l G. de la Mata.
Tomas Maceos.
Manuel Perez.
Uriarte Humanos.
Andres Torres.
Mig'l Garcia.
Cosme Furlong.

Alfonso Neron.
Jose Mur'o Buen Abao.
Juan Chrisost'o de Lizadla.
B. Raso.
G. Samin.
Fran'co Blanc.
J. de la Garca.
Jose Joaquin Ramierz.
Roberto Smith.
L. Romes.
A. Dasque.

We certify that the signatures of Messrs. Jose Maria Pavon, Jose Antonio Serrano, Lorenzo Fernandez, Jose Maria de Guadalupe Pavon, and Jose Maria Fernandez, which are at the foot of documents on pages 1, 2, 3, and 4, 7 and 8, 9, and 10, are the true handwriting of said persons, and that they at present fill the offices they mention in their attestation; so also all those which are on the preceding page 11, are those of the gentlemen who signed them, the same they are accustomed to use, and to which are and should be given entire faith and credit in court and thereout. In testimony whereof, we make the present, in Puebla, this 26th of October, 1849.

GREGORIO SANDOVAL.
JOSE DEL RASO.
JUAN PEDRO NECOECHEA.

The underwritten notaries who, at the foot sign and mark, certify that Messrs. Gregorio Sandoval, Jose del Raso, and Juan Pedro Neccochea, are notaries public of the city of Puebla, and the foregoing signatures are theirs, to which are to be given entire faith and credit.

In testimony whereof, we give the present at Mexico, this 29th of October, 1849.

MANUEL DE MADANAJO.
FERMUNI VILLA.
FRAN'CO CALAPSIS.

[Attested by the American Consul at Mexico.]

WAR DEPARTMENT, *Washington, December 8, 1849.*

SIR: The proceedings in the case of Mr. Port, at Puebla, Mexico, were requested by you on the 23d of October last. The original papers having been obtained from the commander-in-chief, in New York, a copy of them is herewith enclosed in compliance with your request.

I have the honor to be, very respectfully,

Your obedient servant,

GEORGE W. CRAWFORD,
Secretary of War.

Hon. J. M. CLAYTON, *Secretary of State.*

WAR DEPARTMENT, *Washington, February 22, 1849.*

SIR: Mr. Port, a French citizen, has presented a claim for damages sustained by him in consequence of the seizure of 500 bales of tobacco, by order of General Childs.

It appears incidentally in the proceedings of a board of officers at Puebla, that this tobacco was part of a quantity belonging to one Domercq, which was seized by General Childs under the belief of its being the property of the Mexican Government, and after the siege of Puebla, was sold by you at public sale to one Wingierski, and by him to Mr. Port; subsequently, on the claim of the owner, Domercq, it was taken from Mr. Port and delivered up.

You will please report to this department the circumstances of the transaction fully, so far as they bear upon the merits of Mr. Port's claim and the damage sustained by him.

Very respectfully, your obedient servant,

W. L. MARCY,
Secretary of War.

Captain CHARLES R. WEBSTER,

Late Assistant Quartermaster, Boston, Mass.

Proceedings of a Board of Inquiry held at Puebla, (Mexico,) the 17th day of November, 1847, by virtue of the following order:

HEADQUARTERS, DEPARTMENT OF PUEBLA,

[Order No. 118.]

Puebla, November 17, 1847.

A board of inquiry will convene this morning at ten o'clock, at brigade headquarters, to inquire into the merits of certain claimants to a lot of tobacco recently sold by Captain Webster, quartermaster.

Colonel Brough, 4th Ohio volunteers, Lieutenant Colonel Dumont, 4th Indiana volunteers, Captain Pugh, Ohio volunteers, will constitute said board.

Lieutenant Waters, Louisiana mounted volunteers, will act as recorder of said board.

By order of General Lane:

H. RIDGELY,
1st Lieut. 4th Infantry, A. A. A. General.

The board met pursuant to the above order, present: Colonel Brough, 4th Ohio volunteers, and associate members, Lieutenant Colonel Dumont, 4th Indiana volunteers, and Captain Pugh, Ohio volunteers.

The board having been duly sworn, in presence of the parties, J. R. Port, and J. B. Domercq, who were each first duly asked if they had any objection to any member of said board, and who each answered in the negative, adjourned till tomorrow, the 18th November, 1847, at 9 o'clock A. M.

BOARD OF INQUIRY,
Puebla, November 18, 1847.

The board convened this day at the hour appointed: Present, Colonel Brough, and Captain Pugh; absent, Lieutenant Colonel Dumont and the recorder, Lieutenant Waters, engaged on active service. There not being a full board, an adjournment was ordered by the president till to-morrow, the 19th November, 1847, at nine o'clock A. M.

BOARD OF INQUIRY,
Puebla, November 19, 1847.

The board met pursuant to adjournment: Present, Lieutenant Colonel Dumont, Captain Pugh, and the recorder, Lieutenant Waters; Colonel Brough absent by reason of severe indisposition. Major Young, 4th Ohio volunteers, appeared, and, after having been duly sworn, took his seat as a member of the court in virtue of the following order:

HEADQUARTERS, DEPARTMENT OF PUEBLA,
[Order No. 122.] *Puebla, November 19, 1847*

Colonel Brough, 4th Ohio volunteers, is relieved from duty on the court of inquiry, constituted as per order No. 118. The court will now consist of Lieutenant Colonel Dumont, 4th Indiana volunteers, Major Young, and Captain Pugh, 4th Ohio volunteers, who are required to assemble forthwith for duty.

Lieutenant Waters, Louisiana mounted volunteers, will act as recorder.

By order of General Lane:

S. DOUGLASS,
1st Lieutenant and Aid.

The claims of both parties were then read, having been presented in writing, (see documents marked A and B,) and the court proceeded to the examination of witnesses.

Colonel Thomas Childs, civil and military governor of the department of Puebla, being first sworn, was desired by the court to state all within his knowledge relative to the matter before the court, and answered as follows :

The first knowledge witness had of any tobacco being in San Jose was derived from information submitted to him by Captain Webster, depot quartermaster, some ten or fifteen days after the army had left for the city of Mexico ; there was at that time no money in the quartermaster's or any other department here. Supposing the tobacco to be the property of the United States, witness directed the quartermaster to sell the same ; in consequence of the position of affairs at the time, no purchaser could be found for a single pound. During the siege, his secretary and interpreter, Mr. Wingierski, informed witness that a quantity of tobacco was deposited in a building one square beyond the position occupied by the Americans ; witness immediately ordered out a guard, seized the tobacco, and used it for fortifications along his chain of sentinels ; the number of bales was 135, or 235, witness does not recollect which. The siege being raised, Mr. Domercq (witness thinks on the day the siege was raised) called upon the witness at his office, and through his secretary and interpreter stated, (as it was interpreted to witness,) that Mr. Hargous was the agent for the tobacco. Knowing that Mr. Hargous had been an agent for the United States in many transactions, witness supposed him to be merely the agent for the government for the sale of the tobacco, captured by General Worth, and that this was the tobacco remaining on hand, and replied that it was all very right if Mr. Hargous was the agent, whereupon Mr. Domercq withdrew. Witness had reason to believe that the secretary and interpreter falsely interpreted the representations made on various occasions by Domercq, and that he took means to prevent Domercq from seeing witness by evasive answers. Witness was not aware of any sale made to Domercq, but supposed the tobacco government property, until after it was advertised for sale, when a third party (a friend of Domercq) called on witness and exhibited bills of sale which satisfied him that it was not government property. Witness immediately sent orders by the third party to stop the sale ; he had been previously told by the secretary and interpreter when he asked how it was that the tobacco was to be sold, that it was too late ; that the tobacco was advertised for sale, and that his remedy must be against the United States ; it was after this that the third party called on the witness and exhibited bills of sale. Witness is of opinion that the present claimant (Port) was in collusion with the secretary and interpreter in the tobacco purchase, and that both Port and the secretary and interpreter have been engaged in a nefarious attempt to speculate on the tobacco to the injury of the former purchaser, Domercq. His reason for this opinion is, that so large a quantity of tobacco could not have been sold in Puebla without the fact being known to all the tobacco dealers. The secretary and interpreter died subsequently to the sale made by the quartermaster.

Has every reason to believe that the secretary and interpreter were to receive two dollars (\$2) per bale from the last purchaser, (Port,) and has been informed that one thousand dollars (\$1,000) was due to the estate of Wingierski by Port, which witness has not yet collected as he has been waiting the issue of the matter now pending before the court. Witness has no positive knowledge that Port was cognizant of the original sale; submits two papers from General Worth, (Doc. C and D,) received by him since the last sale. Since the death of Wingierski, many circumstances have come to the knowledge of witness, which induce him to believe Wingierski to have been capable of almost any dishonest act; has discovered that on a number of occasions false interpretations have been made of communications had between himself and other parties.

Cross-examined by the claimant, Port.

Question. Did you not come to the quartel on the 23d of October—the day the delivery of the tobacco to me took place?

Answer. Does not recollect having been in the quartel since the siege was raised; never to his recollection saw Port before the present time; knew that the tobacco was in San Jose; never knew the particular building in which it was stored; had no control over it, further than the orders given to the quartermaster, as already stated.

At request of claimant Port, claimant Domercq was then sworn, Port being previously advised by the court that the testimony, if called for by himself, must be taken without exception.

Question. Did I not, on several occasions, inform you that I intended to buy the tobacco?

Answer. The first time I ever heard anything on the subject was one day when Port called, in my hearing, to the son of the Spanish consul, and asked him if he did not wish to join him in the purchase of the tobacco; the reply to which was, "no; for it is the property of a friend, and you will make yourself liable to reclamations." Some day or two after, Port told witness he had purchased five hundred (500) bales of the tobacco, and asked him if he did not wish to join him in the purchase, to which he replied in the negative, for he did not wish to purchase his own property; Port answered that that made no difference; that he could always interpose his claims.

Question. On the 23d of October did you not come to San Jose, and converse with me on the subject of the tobacco, at the time its delivery was being made?

Answer. Witness perfectly recollects having been at San Jose on the day the tobacco was delivered to Port; went into the warehouse, saw Port, who told him he was receiving five hundred (500) bales, and that, after the delivery of that quantity, there would not remain much in store; told Port that there ought to remain in store more than eight hundred (800) bales, inasmuch as the receipt of the quartermaster called for thirteen hundred and twenty-five (1,325) bales.

Question. On the 1st of November did you not, at Mr. Abadie's house, ask me to give you the marks, (Doc. E,) as per document presented, of the tobacco?

Answer. Yes ; I have a contract with the city government of Mexico, by which I am bound to deliver thirteen hundred (1,300) bales of tobacco, and having but seven hundred (700) bales in possession, I called on Mr. Port to know the marks of what he had, as in the event of failure in my application to General Lane, it would be necessary to purchase, where I could find it, enough to fill out my contract.

Question. On the next day did you offer me (\$31 or \$32) thirty-one or thirty-two dollars per bale for the tobacco?

Answer. I did make such an offer, because I wished to be sure where I could obtain the tobacco in the event of failure in my application to General Lane. Had I purchased, it would have been conditionally, subject to General Lane's action on said application.

The court then adjourned till to-morrow, the 20th of November, 1847, at 9 o'clock a. m.

BOARD OF INQUIRY,
Puebla, November 20, 1847.

The court met pursuant to adjournment.

Captain Webster being duly sworn, testified that, by order of Col. Childs, he sold (500) five hundred bales of tobacco ; the price agreed on with Wingierski was (\$22) twenty-two dollars per bale, but Wingierski never paid the money, nor took possession of the tobacco, nor in any other way exercised right of property ; Wingierski told witness he had sold the tobacco at (\$24) twenty-four dollars per bale to Port ; soon after (witness thinks the same day) Port came to witness and told him he would take the tobacco at (\$24) twenty-four dollars per bale ; told Port he might have it ; Port paid eight thousand (\$8,000) dollars in cash, and the balance was passed to the credit of the United States, against Port, for supplies of clothing, &c., which he was then and is now furnishing for account of the United States ; the tobacco was the same now in controversy before the court ; witness thinks there could have been no dishonest collusions between Port and Wingierski ; has had many transactions with Port and always found him upright and honest in his dealings.

The testimony in the case being closed, the court proceeded to find the following, viz :

The board, finding no material contradiction in the statements of the different witnesses, deem it unnecessary any further to specify the facts proven than to decide that the testimony supports the substantial allegations of Domercq's petition.

They are of opinion that the (500) five hundred bales of tobacco sold by Captain Webster to Mr. Port were at the time of the said sale the property of Mr. Domercq, and not the property of the United States, and award the possession and ownership thereof to him, the said Domercq ; and that the quartermaster, Captain Webster, pay to Mr. Port eight thousand dollars, (\$8,000,) with interest from the date of its payment to him, and cancel the credit of four thousand dollars (\$4,000) to the United States in its accounts with Port for clothing, &c., supplied.

As to the repayment of the purchase money to Port, Major Young dissents on the following grounds, viz: Port sold the said tobacco to persons not parties to these proceedings, and who may have paid him, the said Port, for the same; that the quartermaster retain the purchase money until the question as to whom the money shall be paid, shall be decided by some competent authority.

There being no further business before the court, it then adjourned *sine die*.

E. DUMONT,
Lieutenant Colonel and President.

WM. P. YOUNG,
Major 4th V. V.

G. E. PUGH,
Captain 4th O. V.

S. W. WATERS,
First Lieutenant Cavalry and Recorder.

HEADQUARTERS MILITARY DEPARTMENT OF PUEBLA.
Puebla, September 12, 1847.

[Order No. 23.]

Captain Webster, acting quartermaster, will sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed.

THOMAS CHILDS,
Colonel Commanding.

Aviso â todos los que les puede interesar.

El capitan del 2d regimiento de artilleria W. C. de Hart, es teniente gobernador de la ciudad de Puebla, y el Sr. D. Alphonso de Wingerski, secretario.

THOMAS CHILDS,
Coronel y Gobernador civil y Militar.

I certify that I advertised the sale of tobacco on the 15th of October, for the 19th of October, by causing the notice of such sale, in Spanish and English, to be publicly fixed and placarded on the corners of the principal streets and thoroughfares of this city; and I further certify, that the following is a true copy of the original, in Spanish, and was taken from some public place after the sale of said article.

CHARLES R. WEBSTER,
Captain and acting quartermaster.

Aviso.

OBRE 16 DE 1847.

Se venderá unos quinientos tercios de tabaco pava el 19 del presente en el caurtel de Sor. San Jose á las tres de la tarde en venta publica.

[Translation.]

On the 19th instant, there will be sold, at public auction, at three o'clock in the afternoon, at the cuartel San Jose, five hundred bales of tobacco.

ASSISTANT QUARTERMASTER'S OFFICE,
October 30, 1847.

SIR: You will please suspend the sale of the tobacco purchased of me for the present. You are perhaps aware that the whole is claimed by Senor Domercq.

Your obedient servant,

CHARLES R. WEBSTER,
Captain and acting quartermaster.

J. A. PORT, Esq.

QUARTERMASTER'S OFFICE,
Puebla, Mexico.

Received, Puebla, Mexico, November 29, 1847, of Captain Chas. R. Webster, assistant quartermaster, U. S. Army, twelve thousand dollars, delivered to him as proceeds of sale of captured tobacco, the said sale having been declared not valid.

J. ALEJO PORT.

PUEBLA, *November 29, 1847.*

Recevi del S. D. Alejo Port, la cantidad de diez y seis mil quinientos pesas valor de quinientos tercies tobacco que me havia vendida a 33 ps. el tercio en 27 de Obre del anno de 1847.

[1,650 ps.]

T. ABADIE.

A.

PUEBLA, *October 29, 1847.*

GENERAL: On the 21st of May last, Quartermaster Captain Allen sold to Mr. L. S. Hargous 2,081 bales of tobacco, as seen in document No. 1; and on the 16th of June Mr. Hargous sold me the tobacco, as manifested by document No. 2; and on the 12th of June Capt. Allen gave me an order, No. 3, that I might receive, when I thought convenient, the 1,325 bales that were deposited in the warehouses of San Jose.

On the 5th of August, when the army of the United States marched for Mexico, and as a very small force was left in this city, I requested Mr. Hargous before leaving to present me to Col. Childs, that he might know me as the owner of the tobacco, and protect me in case that any attempt should be made on the part of the Mexican government. Col. Childs told Mr. Hargous that I might rely on his protection, and to which effect he gave me a safeguard, signed by the Commander-in-chief, that I might be enabled to apply for assistance at any of the posts occupied by the American troops. The governor asked me where the tobacco was deposited. I told him that a part

was in San Jose and the rest in different parts of this city. The deponent seeing the probability of a siege, removed 219 bales from the street of Herveros and other parts to a place that was under the fire of the American army, in the street of San Jose, No. 2, on the 9th of September. This house was inhabited by some American officers, next door to the baker's that supplied the American army with bread, thinking the tobacco would be secure from any attack. On the 23d September I received advice that the balcony and doors had been broken and forced open, and the Americans had taken possession of the 219 bales of tobacco by order of the governor. It was impossible for me to lay claim to the tobacco in the act, as hostilities had commenced; besides, trusting to the honor of the governor, who, in a case of emergency, made use of property that did not belong to him, he ought to be disposed to make me an indemnification for my loss. On the 13th of the present month, after the army commanded by you had entered the city, I presented myself to Col. Childs and informed him that the bales of tobacco had been used for fortifications and had been wet; that they were rendered perfectly unsalable, to which the governor answered by his secretary that he would order them to be taken care of. On the 14th I returned to lay claim for the damages that these bales had suffered, and the answer that I received was not very satisfactory. The same day I went to San Jose, and found the doors of the warehouse open in which the tobacco was deposited. I immediately returned to the house of the governor, and as I did not find him at home I requested the secretary to permit me to put a padlock on the door, and allow me to collect the bales that were in the yard that had served for fortifications. The secretary accompanied me immediately to San Jose and ordered the officer of the guard to put a sentinel at the door of the warehouse, and that he would inform the governor of the circumstance. The next day, 15th of this month, I again returned to the governor's house and told the secretary that I had come to put on the padlock, and requested him to give me an order to permit me to do so, when the secretary assured me it was useless; that the governor had given an order that the bales that were in the yard should be taken care of, and that the doors had been nailed up. I then went to San Jose and found that it was as he had stated. Being at rest on this point, I went to seek a proper place in the city in which I could deposit the bales; and having found one on the 19th instant I went to the house of the governor in order to inform him of my wish to remove the tobacco to another place; but what was my surprise when I saw bills posted at the different corners of the street advertising for sale the tobacco that was in San Jose. I immediately made a representation to the secretary, not being able to do so personally to the governor, as I am perfectly ignorant of the English language, telling him that I could not in any way permit the sale to take place, and presented to the secretary the documents which proved the tobacco to be my property, when the secretary answered that it was too late, and that all the tobacco had been sold by order of the governor; and that 700 bales had been bought by Mr. Weshe and 500 bales by a person that he did not know; but the governor would give me a certificate, signed al o by

the quartermaster, in which he would manifest that he had ordered the sale of the tobacco, in order to procure funds to supply the urgent necessities of the army; and that the amount of the certificate would be paid me in Mexico. I then said that I should like to see the governor immediately on the subject, when the secretary observed that it was impossible; that he would speak to him himself, and would be answerable of the result. I felt some consolation by these assurances of the secretary, but went to see him every day on the business, and on each visit received new promises.

At last, being convinced that the secretary only wished to gain time in order to make money on the tobacco, which he did on the sale of the 500 bales that were sold on the 20th to Don Alexo Port, on which sale he gained one thousand dollars. I therefore employed another person to speak to the governor on the subject, and ask him for the certificate which the secretary had promised me. This was on the morning of the 26th. The governor expressed to be greatly surprised, and said that he was ignorant of the whole affair. The governor having entirely forgot the promises which he made when I was presented to him by Mr. Hargous, he had also forgotten the claim which I made to him on the 13th and 14th of this month. It is natural to suppose that when I laid claim to the tobacco that I presented documents to support it, and the governor again repeated that he knew nothing relative to the business of which I spoke, but that I could receive the tobacco that still remained on hand. I then observed to the governor that I thought it just that the 500 bales which the quartermaster had sold to Don Alexo Port should also be returned, as this gentleman had only paid \$3,000 on account, when he told me that he had nothing to do with the business, and did not wish me to speak to him again on the subject, but that I could come to an understanding with the quartermaster. On seeing this gentleman he informed me that he could do nothing in the business, as he had sold the tobacco by order of Colonel Childs, but that I could make application to the general, which I now do in the most respectful manner, supplicating him that, having proved the facts here manifested, that he will order the 500 bales of tobacco sold to Port to be returned, as it is not just to suppose that the army of the United States would sell the same article twice and receive money for it; and according to the laws of trade the first sale is always valid. Neither is it just that I, the deponent, should lose the enormous quantity of 1,260 bales of tobacco, when at least the half of them had served as fortifications. Returning me the 500 bales that were sold to Don A. Port, there will remain 760 bales that were used as fortifications, and which have been sold to the soldiers of the army by permission of the governor; for these the deponent will be satisfied by receiving a certificate, manifesting that these have been taken for the use of said army of the United States.

The governor alleges that when he made use of said tobacco he believed it to be the property of the United States, as he had seen no document to prove that it had been sold. But the governor could have no motive to think that the tobacco belonged to the United States; but if the tobacco had actually been the property of the United States,

it is natural to suppose that Captain Allen, previous to his marching to Mexico, would have advised his successor of the circumstance; but, on the contrary, I was presented personally to the governor as the owner of the tobacco, and acknowledged as such. The governor also says that he had no knowledge of the documents which proved me to be the owner of the tobacco until the 26th; but the Governor should certainly suppose that when I laid claim to the tobacco on the 13th and 14th of the present month, that I should not have done so if I had not documents to prove that the tobacco was actually my *bona fide* property. It is also very strange to suppose that when I laid claim to property which the governor supposed to belong to the United States, that he did not ask by what right I laid claim to the tobacco. Besides, the governor must know that I am totally ignorant of the English language, and was therefore obliged to apply personally to his secretary, who should possess the unlimited confidence of the governor, particularly so, as the name of his secretary was affixed to various documents that were published by the governor. Consequently I cannot but think that the governor is morally responsible for the abuse of confidence placed in his secretary, more particularly as he was the person to whom every person who did not understand the English language were forced to apply, when they had any application to make to the governor.

Not wishing to intrude further on the time of the general, I make one more observation: that the governor, having considered it just that I should take possession of the bales of tobacco that were still remaining in San Jose, I also consider it just that the 500 bales that were sold to Don Alexo Port should also be returned to me.

I have the honor to be, general, your obedient and most humble servant,

BN. JUAN DOMERCQ.

Brigadier General T. LANE, &c., &c.

B.

On the 16th October, 1847, was advertised for sale by the quartermaster at St. Joseph, in the city of Puebla, Mexico, by the order of the governor of said city, a lot of 500 bales of tobacco on the 19th of said month, at public sale. Captain Charles B. Webster, quartermaster of said city, sold me the above 500 bales of tobacco at twenty-four dollars per bale, and delivered to me the same tobacco on the 21st, 22d, and 23d of the above mentioned month, of which I paid him the sum of twelve thousand dollars for the said tobacco.

J. A. Port, purchaser of said tobacco, sold the above-mentioned tobacco to Mr. John Abadie, on the 27th of October, 1847.

I received on the 30th of October, 1847, a letter from Quartermaster Charles B. Webster, informing me to suspend the sale of the said tobacco for the present; of which, on the receipt of the same, I answered to the quartermaster on the 31st of October, that I had sold the above-mentioned 500 bales of tobacco on the 27th of the same month.

The above mentioned tobacco that I purchased from Quartermaster Chas. B. Webster, was captured from the Mexican government by the Americans, which I can prove by these witnesses that are here present.

Please the President to let me remark to the court that when sales are made publicly, there are no sales more legal than them.

The person claiming the above mentioned tobacco was in this city at the time it was advertised for sale by the quastermaster of this city, and did not claim the same until some time after the sale was effected, and which proves that the said person claiming the tobacco offered to purchase the said tobacco after the sale had been effected, and it is natural that no one will buy his own property.

I hope that through the justice of the court, they will please take into consideration all of which exposé, as much for the revenues of the government, the rights, of the people, as the dignity of the acts of the representatives of the United States of America.

J. A. PORT.

PUEBLA, Mexico, *November 18, 1847.*

I do solemnly swear that all the above is the truth, and nothing but the truth.

P. S.—The Court will please excuse us if there are any errors.

P. S.—I furthermore state that no objection was made at the time of the sale, or before the sale, of the said 500 bales of tobacco by John Domercq, who lays claims to said tobacco.

J. A. PORT.

FORT MCHENRY, MARYLAND,
February 23, 1849.

SIR : I have the honor to acknowledge the receipt of your communication of the 22d instant, in relation to Mr. Port's claim for damages on account of a quantity of tobacco purchased by him for a Mr. Wingierski, at Puebla, in October or November, 1847.

In my opinion Mr. Port has no claim on the United States on account of this tobacco. His claim was carefully examined by an intelligent board of volunteer officers, lawyers by profession; and rejected. My evidence is given at large in their proceedings, and covers the whole ground, and I beg leave respectfully to refer you to those proceedings for the merits of the case.

Mr. Port appealed from the decision of the board to Major General Scott, and then to Major General Butler; the latter, I am told, after examining the evidence of the case, was satisfied that Mr. Port had no just claim on the United States.

I do not now recapitulate the facts in this case, as I have not the proceedings of the board to refer to. When I gave my testimony, all the particulars were fresh in my memory. Wingierski was my secretary and interpreter; he knew full well that the tobacco did not belong to the United States, for Domercq had told him so, and wished to see me on the subject, but was refused admission by Wingierski,

under the plea that I was engaged. Mr. Port must have known that this tobacco had been sold but a few months before; he must have known that all the tobacco in Puebla had been seized by General Worth, and publicly sold. It is not at all probable that one thousand or one thousand five hundred bales of tobacco could have been in Puebla in the possession of Mexicans and Mr. Port not know it, and he a tobacco dealer.

I have the honor to be, sir, your most obedient servant,

THOMAS CHILDS,

Brevet Brigadier General United States Army.

Hon. the SECRETARY OF WAR.

HEADQUARTERS DEPARTMENT OF PUEBLA,
Puebla, February 23, 1848.

SIR: I received your communication of the 19th of January last only yesterday, together with Mr. Port's appeal to the general-in-chief, as to certain damages he has sustained by the fraudulent purchase of tobacco. I have only to observe, in answer to this appeal to the general-in-chief, in addition to my testimony before the court of inquiry, that the assertion of Mr. Port, that Mr. Hargous, on the 5th of August, presented to me as his agent, Mr. Domercq, that I might recognize him as the owner of the tobacco, and protect him in his rights over the same, etc.; that on the 5th of August I was not governor, neither did Mr. Hargous at that time, or any other time, present Mr. Domercq to me, to my recollection, and that my testimony before the court presents a true statement of all the circumstances, so far as I am concerned, in regard to this tobacco. I never gave the safeguard spoken of to my knowledge. As to the composition of the court being changed at my suggestion, it is false in every particular. I knew not who composed the court of inquiry until summoned before them to give my testimony. That I am even convinced that both my secretary and Mr. Port knew that this tobacco had been sold by Captain Allen, and that the fact was kept from me for fraudulent purposes, and finally hastened, in my opinion, the death of Mr. Wini-gierski, when he found out that the facts of the case had come to my knowledge from other sources; therefore, I do not consider Port entitled to damages. With these observations, I transcribe my testimony as given before the court of inquiry, and return the appeal to the general-in-chief.

“Colonel Thomas Childs, civil and military governor of the department of Puebla, being first sworn, was desired by the court to state all within his knowledge relative to the matter before the court, and answered as follows:

“The first knowledge witness had of any tobacco being in San José, was derived from information submitted to him by Captain Webster, depot quartermaster, some ten or fifteen days after the army had left for the city of Mexico; there was at that time, no money in the quartermaster's or any other department here. Supposing the tobacco to be

the property of the United States, witness directed the quartermaster to sell the same. In consequence of the position of affairs at the time, no purchaser could be found for a single pound. During the siege, his secretary and his interpreter, Mr. Wingierski, informed witness that a quantity of tobacco was deposited in a building one square beyond the position occupied by the Americans. Witness immediately ordered out a guard, seized the tobacco, and used it for fortifications along his chain of sentinels; the number of bales was 135, or 235, witness does not recollect which. The siege being raised, Mr. Domercq (witness thinks the day the siege was raised) called upon the witness at his office, and, through his secretary and interpreter, stated (as it was interpreted to witness) that Mr. Hargous was the agent for the tobacco; knowing that Mr. Hargous had been an agent for the United States, in many transactions, witness supposed him to be merely the agent for the government for the sale of tobacco captured by General Worth, and that this was the tobacco remaining on hand, and replied that it was all very right if Mr. Hargous was the agent; whereupon Mr. Domercq withdrew. Witness has reason to believe that the secretary and interpreter falsely interpreted the representations made on various occasions by Domercq, and that he took means to prevent Domercq from seeing witness by evasive answers; witness was not aware of any sale made by Domercq, but supposed the tobacco governmental property, until after it was advertised for sale, when a third party (a friend of Mr. Domercq) called on witness and exhibited bills of sale, which satisfied him that it was not government property. Witness immediately sent orders by the third party to stop the sale. He had been previously told by the secretary and interpreter, when he asked how it was that the tobacco was to be sold, that it was then too late; that the tobacco was advertised for sale, and that his remedy must be against the United States. It was after this that the third party "called on the witness and exhibited bills of sale. Witness is of opinion that the present claimant (Port) was in collusion with the secretary and interpreter in the tobacco purchase, and that both Port and the secretary and interpreter have been engaged in a nefarious attempt to speculate on the tobacco to the injury of the former purchaser, Domercq. His reason for this opinion is, that so large a quantity of tobacco could not have been sold in Puebla without the fact being known to all the tobacco dealers; the secretary and interpreter died subsequently to the sale made by the quartermaster; has every reason to believe that the secretary and interpreter were to receive two dollars (\$2) per bale from the last purchaser, (Port,) and has been informed that one thousand dollars (\$1,000) was due to the estate of Wingierski by Port, which witness has not yet collected, as he has been waiting the issue of the matter now pending before the court. Witness has no positive knowledge that Port was cognizant of the original sale; submits two papers from General Worth (doc. C and D) received by him since the last sale. Since the death of Wingierski many circumstances have come to the knowledge of witness which induce him to believe Wingierski to have been capable of almost any dishonest act; has discovered that on a

number of occasions false interpretations have been made of communications had between himself and other parties."

Cross-examined by claimant, Port.

Question. Did you not come to the quartel on the 23d of October, the day the delivery of the tobacco to me took place?

Answer. Does not recollect having been in the quartel since the siege was raised; never to his recollection saw Port before the present time; knew that the tobacco was in San Jose; never knew the particular building in which it was stored; had no control over it further than the orders given to the quartermaster, as already stated.

I have the honor to be, sir, your most obedient servant,

THOMAS CHILDS,

Colonel U. S. A., Commanding Department of Puebla.

Lieutenant Colonel E. A. HITCHCOCK,

Acting Inspector General, Head Quarters of the Army, Mexico.

CITY OF WASHINGTON, *February 25, 1849.*

SIR: I have the honor to acknowledge the receipt of your letter of the 22d instant, requesting me to report the circumstances connected with the claim of Mr. Port.

I have been unable to find the order of Governor Childs, or the advertisement of the sale of tobacco. My impression is that they were furnished to a court or board of officers, that convened at Puebla, Mexico, by order of General Lane, on the 17th day of November, 1847.

In accordance with the order of Governor Childs, I advertised the tobacco for sale by causing notices of the same to be affixed in the most public places of the city, in Spanish and English. On the day previous to the one on which it was advertised to be sold at auction, Mr. Wingierski, then secretary to the civil and military governor, Colonel Childs came to me and stated that he wished to purchase the tobacco and would give \$22 per bale for it. I declined, however, telling him that, if not offered more for it on the morrow, he could have it at that price. On the day of the sale, no purchaser appeared except Mr. Port, who offered me \$24 per bale, which I accepted. The money was paid by Mr. Port, and the tobacco (500 bales,) delivered to him.

Shortly after this sale, Mr. Domercq called on Colonel Childs with papers showing that he was the owner of the tobacco. Colonel Childs referred him to me, requesting me to examine into Domercq's claim, and, if satisfied that he was the owner of the tobacco, to call upon Mr. Port to re-deliver the tobacco to me, that I might put Mr. Domercq in possession. I wrote immediately to Port, who informed me that he had sold the tobacco to Mr. Jean Abadie.

Under these circumstances, and with the advice of General Lane and Colonel Childs, I endeavored to effect a compromise between the parties. Failing in this, I suggested to General Lane the propriety of calling a court to decide on the conflicting claims of the parties.

That court decided that Domercq was the rightful owner, and that

the tobacco should be re-delivered to him. That the quartermaster, Captain Webster, should pay back to Port the \$12,000, take the tobacco, and put Domercq in possession.

General Lane approved the proceedings, and ordered me to carry them into effect.

This is a brief statement of the fact as known to me.

I have the honor to be, with high respect,

Your obedient servant,

CHARLES R. WEBSTER.

Hon. W. L. MARCY,
Secretary of War.

HEADQUARTERS, ARMY OF MEXICO,
Mexico, March 7, 1848.

SIR: In the course of business, my attention has just been called to a complaint of S. P. Port & Co., made through the French minister at Washington, and forwarded by you, respecting a sale of tobacco, seized by Major General Worth at Puebla.

Colonel Childs the commander at that place, has been ordered to report direct to the War Department the nature and history of the case. I have refused, as did Major General Scott, to interfere with the decision of the court of inquiry in the matter, believing that the complainants have been allowed the fairest opportunity to substantiate their claims, if just.

In this connexion I beg leave to remark, that the fraudulent claims and attempts to recover Mexican property on pretext of neutral ownership, have been almost innumerable, and usually as baseless as they are boldly urged.

A copy of instructions to Colonel Childs on the subject is herewith enclosed.

I have the honor to remain, with high respect,

Your obedient servant,

W. O. BUTLER.

Hon. W. L. MARCY,
Secretary of War.

HEADQUARTERS, ARMY OF MEXICO,
Mexico, March 7, 1848.

SIR: I am directed to enclose you additional papers received here, respecting a tobacco case decided by Brigadier General Lane, in Puebla, November 20, 1847.

Other papers relating to the same case have been returned through you with the remark, that the decision made as above was final, as far as the military authority was concerned.

An appeal has been forwarded through the French minister at Washington and the War Department.

The details of the case are not well understood here; Major Gene-

als Scott and Butler having successively refused to go into the case after the decision of the court of inquiry and the commanding officer at Puebla.

Major General Butler desires you, therefore, to report the history of the case directly to the War Department, keeping in reserve the documents necessary to its understanding, should they be called for. The records of the court of inquiry are believed to be among your archives; a copy of the finding and order in the case will, it is presumed, suffice for the War Department.

Very respectfully, your obedient servant,

GEORGE W. LAY,

Lieutenant and Acting Deputy Commissary.

Colonel CHILDS,

Commandant of Puebla.

HEADQUARTERS, DEPARTMENT PUEBLA,

[ORDERS No. 11.]

Puebla, May 9, 1848.

A board of officers, to consist of Major W. W. Morris, 4th artillery, Captain H. L. Kendrick, 2d artillery, and Captain C. S. Wight, Illinois volunteers, will assemble at the palace at 10 o'clock to-morrow for the purpose of inquiring into and reporting the facts connected with the seizure of a certain lot of tobacco claimed by Don Juan Domercq, a Spanish resident of this city.

The board, in addition to reporting the amount of tobacco lost or rendered useless in consequence of said seizure, is required to state what, in its opinion, would be a fair price for the quantity thus lost to the claimant, and if practicable it will ascertain the price contracted by the Mexican to be paid to the planters.

Captain Wight will record the proceedings of the board.

By order of Colonel Gorman:

O. F. WYNSHIP, *A. A. G.*

W. SPENCER, *A. A. G.*

The board met pursuant to the foregoing order: Present, Major W. W. Morris, 4th artillery, president; Captain H. L. Kendrick, 2d artillery, Captain C. S. Wight, 2d Illinois volunteers, recorder.

The board was unable to proceed to business in consequence of the absence of the claimant and his witnesses. The board therefore instructed the recorder to notify the former and summon the latter to appear before it on the succeeding day at 10 o'clock a. m.

The board then adjourned to meet to-morrow at 10 o'clock a. m.

Second day, May 11. The board met pursuant to adjournment. Present, Major W. W. Morris, 4th artillery, president; Captain H. L. Kendrick, 2d artillery, Captain C. S. Wight, 2d Illinois volunteers, recorder.

The proceedings of the board yesterday were read by the recorder and approved by the board, and the following order was read and recorded as a part of the order organizing the board:

"OFFICE OF THE CIVIL AND MILITARY GOVERNMENT,
"Puebla, Mexico, May 10, 1848.

"It is ordered that C. S. Wight, 2d Illinois volunteers, be, and he is hereby, authorized as recorder of a board of officers ordered and convened at the palace to inquire into and report upon the loss, and amount of damage arising therefrom, of a quantity of tobacco used by Colonel Childs for defence during the siege of Puebla, to administer all oaths necessary in the course of the investigation.

"Witness my hand and signature as civil and military governor of of the State of Puebla.

"W. A. GORMAN,
"Colonel and Civil and Military Governor."

Attest:

D. SHADLER, *Secretary*.

The board then adjourned to hold its sessions at the quarters of the president.

Upon assembling, Señor Manuel Miranda, the Spanish vice consul resident in this city, and the attorney and agent for the claimant, Don Juan Domercq, was asked by the recorder if he had any objections either to the members of the board or the mode of investigation, and was interrogated by the president if he had any documentary evidence to exhibit which had not already been submitted to it. To all of which he replied in the negative. Whereupon, William Spencer was called and sworn as an interpreter, to well, truly, and faithfully interpret to the witnesses all questions propounded by the board, and the answers of the witnesses thereto.

Señor Joaquin Matemunto was then called, who, having previously been sworn on the cross by the recorder, through the interpreter, states to the board, in the Spanish language, which is translated to the board by the interpreter, as follows:

I was present when Mr. Hargous sold 2,081 bales of tobacco to Domercq. This was, I think, in June last, and at the Diligence hotel in this city.

I visited Colonel Childs frequently with Domercq in June, August, and November, 1847, in reference to a deficiency of 1325 bales of tobacco.

I was present when 219 bales of tobacco were stored in a house adjoining the quarters of Colonel Childs; this was between the 13th and 18th of August, 1847, near San Jose. Some time in October, I think about the 20th, Mr. Domercq and myself visited the house, and the windows had been broken open and the tobacco taken out. In August, 1847, I accompanied Mr. Domercq to the quartel and this city, and there deposited 1325 bales of tobacco for safe keeping, in the presence of several American officers. In November, 1847, Captain Webster, quartermaster of the United States army, delivered to me for Domercq 284 bales of the lot of tobacco deposited in the quartel in August, 1847. A short time afterwards Captain Webster, quartermaster United States army, delivered to me for Domercq 37 bales more of the same tobacco, and about the same time Colonel Childs sent me for Domercq two bales more. General Lane also de-

livered to me for Domercq 500 bales more, a short time after the fight at Tlascala. During the latter part of October, 1847, I saw American soldiers selling tobacco of the same quality as that deposited in the quartel in August, 1847. At the time of the loss of 721 bales, Domercq was selling the same quality of tobacco at from \$6 to \$7 per *aroba*. I know this because I was present when sales were made. I have no pecuniary interest in the event of this investigation. I acted as the friend and not as the agent of Domercq in making the deposits of tobacco at the quartel. I know that the tobacco deposited in the quartel and in the house adjoining Colonel Childs's quarters was purchased by Domercq of Hargous in my presence, and I received it and brought a piece of it down to the quartel for safe keeping; 537 of the 2,081 bales of this tobacco were left in the church of Companier and other places in this city. I know that there were 219 bales in the house near Col. Childs's quarters in San Jose, and 1,325 bales in the quartel, because I was told so by those that counted it immediately after it was deposited.

Question by the board. Was Hargous the owner or the agent of the owner of the tobacco at the time of the sale of 2,081 bales to Domercq?

Answer. I do not know.

Question by the board. You have stated that 219 bales were deposited in the house adjoining the quarters of Colonel Childs; who had charge of the house and of the tobacco after it was deposited in it?

Answer. Domercq rented the house and had the keys of it.

Question by the board. Are you positive that the house in which the tobacco was stored was under lock and key?

Answer. Yes; I saw it locked up.

Question by the board. Was the quartel also under lock and key?

Answer. Yes; I saw it locked up.

Question by the board. Was the quartel occupied at that time; and if so, by whom?

Answer. It was occupied by American troops.

Question by the board. Was it occupied by American troops during the whole time the tobacco was stored in it?

Answer. Yes; it was all the time.

Question by the board. You have stated that 500 bales of tobacco were delivered to you for Domercq by General Lane; why did he do this, and what had he to do with the delivery of the tobacco?

Answer. He made the delivery; I know not what he had to do with it, or why he did so.

Question by the board. Was any of the lot of 2,081 bales of tobacco lost or destroyed, except that deposited in the quartel and in the house adjoining to Colonel Childs' quarters?

Answer. No; none.

Question by the board. Do you know anything about the tobacco previous to its coming into the possession of Mr. Hargous?

Answer. I do not.

Question by the board. What is the weight of a bale of tobacco; and do all bales weigh the same?

Answer. I do not know.

Question by the board. Are you sure that you visited Colonel Childs

with Domercq in June, 1847, in relation to a deficiency of 1,325 bales of tobacco?

Answer. I went to the quartel, but not for the purpose of seeing Colonel Childs, nor did I see him. In June, 1847, I deposited 1,544 bales of tobacco in the house adjoining Colonel Childs's quarters and in the quartel. I went to the quartel again in August to see if there was a deficiency in the amounts of tobacco I had deposited there, and ascertained that there was not. I went again in November and found a large deficiency.

Question by the board. You have stated that between the 13th and 18th of August, 1847, you deposited 1,544 bales of tobacco in and near San Jose; now you say it was in June, 1847. How do you explain this discrepancy in your testimony?

Answer. I may be mistaken both as to dates and months.

Question by the board. How long after you deposited the 1,325 in the quartel was it that you deposited the 219 bales in the house near San Jose?

Answer. I do not know.

Question by the board. Did you not mean at first that 1,325 bales were deposited in the quartel in June, 1847, and 219 bales in the house near San Jose in August, 1847?

Answer. Yes. I also desire that every statement of mine which does not correspond with this should be corrected, as it must have resulted from a misconception of my testimony.

[The board having no further interrogatories to put the witness was relinquished to Don Manual Miranda, the agent for the claimant, who, having no questions to ask, the witness was dismissed from the stand, and Dr. SCHAELEER was called, who after being duly sworn, says:

When General Worth entered Puebla in May, 1847, he was informed that there was upwards of two thousand bales of tobacco in the city, belonging to the Mexican government. He immediately ordered it to be seized and sold. A short time afterwards, Captain Allen, of the Quartermaster's department, United States army, sold it at public auction, and Mr. Hargous became the purchaser. Mr. Hargous subsequently sold it or part of it to Don Juan Domercq. Mr. Domercq received 1,325 bales at the quartel, and the remainder in different parts of the city. A short time after the army left for the city of Mexico, Don J. Domercq removed 219 bales of this tobacco to house No. 6, in the 2d street of San Jose. About a fortnight after the siege, the Spanish consul came to me and requested me to accompany him to Colonel Childs for the purpose of establishing Domercq's title to the tobacco. Colonel Childs was very much astonished at my narration of the facts, and pronounced them very different from the representations that had been made to him by Mr. Wingierski, his secretary. Colonel Childs also stated to me that Mr. Wingierski had informed him that the lot of tobacco in No. 6 quartel was Mexican property, and that, confiding in the veracity of Wingierski's statement, he had accordingly ordered upwards of 200 bales to be sold by Captain Webster, quartermaster United States army. Colonel Childs at the same time desired me to accompany Mr. Domercq to Captain Webster, and say to him, in his name, to stop the sales of the tobacco, and to deliver all on hand to Mr. Domercq. This was on the 22d of October, 1847. The next

day Domercq received from Captain Webster, quartermaster United States army, 284 bales of tobacco. On the next day Domercq received 37 bales more from the same officer, and on the next day Colonel Childs sent Domercq 2 bales more. Colonel Childs also spoke to me in relation to 500 bales more which had been purchased by Mr. Wingierski at auction for \$22 per bale, and which he subsequently sold to a Mr. Port for \$24 per bale. Afterwards General Lane instructed Captain Webster, quartermaster United States army, to take eight men to Mr. Port's house, take possession of the 500 bales of tobacco, and deliver it to Domercq, all of which was done. Tobacco of the quality lost by Domercq was worth, just before the siege, from \$6 to \$6 50 per *aroba*; an *aroba* is 25 pounds, more or less.

Bales of tobacco were used by Col. Childs in fortifying the quartel, constructing parapets upon the house-tops, and barricading the streets. American soldiers sold tobacco in the streets of this city after the siege. I saw many bales of tobacco in the yard of the quartel a few days after the siege, exposed to the action of the elements. This was during the rainy season.

Mr. Miranda, Domercq's attorney, having no questions to propound, the board adjourned until to-morrow at 10 o'clock a. m.

THIRD DAY, *May* 12.

The board met pursuant to adjournment. Present, Major W. W. Morris, 4th artillery, president; Captain H. L. Kendrick, 2d artillery; Captain C. S. Wight, 2d Illinois volunteers, recorder.

The proceedings of yesterday were read by the recorder, and approved by the board.

Señor CASTO BRESTOR, having first been duly sworn upon the cross, says as follows, through the sworn interpreter, Mr. Spencer:

Mr. Hargous told Domercq early in June, at the time of the sale of the tobacco to him, that 1,325 bales of it were in the quartel in this city, and that the remainder of the tobacco was in the church of San Augustine; two hundred and nineteen bales of tobacco stored in the church of San Augustine were removed to No. 6, 2d street, of San Jose, near Col. Childs's quarters, on the day that General Twiggs left Puebla for the city of Mexico. I received this lot of tobacco myself, and deposited it in the house No. 6.

Shortly after the siege, I accompanied Domercq to the quartel, and found but 284 of the 1,325 bales of tobacco that had been deposited there. Domercq received the 284 bales at that time, and afterwards stored it in the church of Companier. A few days afterwards, Domercq received thirty-seven bales of Captain Webster, and two of Col. Childs; and early in November, Domercq received five hundred bales of Gen. Lane, which had been sold to Port; which still left a deficiency of seven hundred and twenty-one bales. I have no interest in the event of this suit. Domercq told me in 1837, that he was born in Spain, of French parentage. Tobacco of the same quality as that lost by Domercq was selling before the siege for from \$6 to \$7 per *aroba*. Domercq resides in the city of Mexico; house No. 6, 2d street of San Jose, was locked up after the tobacco was deposited in it, and

Domercq had the key. In the latter part of October, I accompanied Domercq to No. 6, San Jose, and found the door broken open and the tobacco taken out.

Neither the board nor the claimant, through his agent, Mr. Miranda, having any further interrogations to put to the witness, he was dismissed from the stand, and Señor FRANCISCO MUNOZ was called, who, having been previously sworn on the cross, testifies through their sworn interpreter, Mr. Spencer, as follows :

I know nothing of the loss of the tobacco, except from the representations of Domercq to me. I believe Domercq to be a Spanish citizen, because I have seen letters from his family in Spain. I do not know the price stipulated to be paid by the Mexican government to the planters.

Question by the board. What was tobacco selling for before the siege, in this city?

Answer. For from \$6 to \$7 per *aroba*.

Question by the board. What is the average number of *arobas* to the bale?

Answer. Eight.

JOHN DE OLMA was then called, and having been sworn upon the cross, testifies as follows, through the sworn interpreter of the board:

Early in June, 1847, I saw Hargous deliver to Domercq, at the quartel, what he represented to be 1,325 bales of tobacco. In August, 1847, I saw Domercq deposit a large number of bales of tobacco in No. 6, 2d street of San Jose. Señors Brisbe and Nuierta were also present at the time. As soon as the tobacco was deposited, Domercq locked up the house, and took possession of the keys. I know Domercq to be a Spanish citizen, because I have seen his passports, as also his letter of protection of the date of 1847. I do not know what is the price the Mexican government contracted to pay the planters for tobacco.

Neither the claimant nor the board having any other interrogatories to propound, the witness was dismissed, and Mr. WILLIAM SPENCER, the interpreter for the board, after being duly sworn, says :

I have been the agent and interpreter of Captain Webster, quartermaster United States army, since the 1st of August, 1847. After the siege commenced, I was ordered by Col. Childs to break open the doors of the quartel and house No. 6, 2d street of San Jose, and to use the tobacco in them in constructing breastworks, &c., for the defence of the American troops. All the bales in both houses were turned out, and used during the siege in fortifying the house-tops and barricading the streets. This was during the rainy season, and some ten bales were destroyed and spoiled by exposure to the sun and rain. When the siege was over, the tobacco was again deposited in the quartel. I put locks on the doors of the quartel at three different times, and the doors were as often broken open and tobacco taken out, and American soldiers were frequently confined in the guard-house under charges for stealing it. There must have been at least two hundred bales stolen out of the quartel after it was deposited there the

second time, and there were at least twenty bales spoiled by the weather and given to the American troops during the siege. After the siege, Col. Childs instructed Captain Webster to advertise the tobacco stored in the quartel for sale, and I wrote the advertisements and had them put upon the corners of the streets. Five hundred bales of the tobacco was sold to Wingierski, at \$22 per bale; and Wingierski shortly afterwards sold it to Port at \$24 per bale. I delivered the five hundred bales to Port on the 22d of October, 1847, by order of Captain Webster. On the 23d day of October, 1847, Colonel Childs ordered the sale of the tobacco to be stopped; and on the 25th October, 1847, I was ordered by Col. Childs, through Captain Webster, to deliver to Mr. Domercq the remainder of the tobacco on hand. I accordingly delivered to Mr. Domercq two hundred and eighty-four bales at one time, and thirty-seven more at another time, and I had official information that two other bales were also delivered to Domercq by Col. Childs. In November, 1847, I went with a detachment of men to Port's house, under order from Gen. Lane, and, upon being refused the keys, burst open the door and took the five hundred bales of tobacco sold by Wingierski to Port, and delivered it to Domercq. The bales in the quartel contained in equal proportions three different qualities of tobacco, and was worth about the 1st August, 1847, \$6 per *aroba* of 25 pounds. I heard Wengierski tell Col. Childs that the tobacco in the quartel and house No. 6, 2d street of San Jose, and Mexican property, and it was in consequence of this information that it was afterwards seized by order of Col. Childs. The men I sent down to remove the tobacco from the Calle de San Jose, shortly afterwards returned for an axe to burst open the door. Eight *arobas* to the bale was the average of the bales deposited in the quartel.

Neither the board nor Mr. Mirandi, the agent for Domercq, having any further questions to ask the witness, he was dismissed from the stand.

Mr. MIRANDA was then duly sworn upon the cross by the recorder, through the interpreter, and the following questions propounded by the board and answered by the witness through the sworn interpreter of the board, Mr. W. Spencer:

Question by the board. Do you know the price stipulated by the Mexican government to be paid to the planters for tobacco? If so state it.

Answer. I do not know.

The witness having nothing further to say, and the board having no other questions to ask, the witness was dismissed.

The board then asked Mr. Domercq's agent, Mr. Miranda, if he had any other witness to produce, or any additional documentary testimony to submit; and upon his answering in the negative, the board adjourned until 10 o'clock to-morrow.

FOURTH DAY, *May* 13.

The board met pursuant to adjournment. Present, Major W. W. Morris, 4th artillery, president; Captain H. L. Kendrick, 2d artillery; Captain C. S. Wight, 2d Illinois volunteers, recorder.

The proceedings of yesterday read by the recorder, and approved by the board.

There being no additional testimony to be adduced, the board, after a distinct recollection of the testimony, find the following facts :

When General Worth entered Puebla, in May, 1847, he seized and caused to be sold upwards of 2,000 bales of tobacco, owned by the Mexican government. Hargous became the purchaser, and subsequently sold 2,081 bales of it to Don Juan Domercq, a Spanish citizen. He delivered 1,325 bales at the Quartel San José, and the remainder in different parts of the city. Domercq removed 219 bales of the tobacco deposited in the church of San Augustine to house No. 6, calle de San Jose, for safe keeping, on the day General Twiggs left Puebla for the city of Mexico. During the siege, at Col. Childs's order, he believing the tobacco to be Mexican property, all the tobacco was taken out of the quartel San Jose, and No. 6, 2d calle de San Jose, and used in constructing breastworks and barricades for the defence of the American troops; in consequence of which, twenty bales were destroyed by exposure to the elements, and presented to the soldiers by Col. Childs's order, and two hundred bales were afterwards stolen from the quartel. In October and November, 1847, 823 bales of tobacco were restored to Don Jean Domercq by order of Col. Childs and Gen. Lane. The board could not ascertain either from the oral or documentary evidence exhibited to it what price the Mexican government contracted to pay the planters for tobacco. The board also find that eight *arobas* constitute a bale of tobacco, and that tobacco of the same quality as that lost by Domercq was worth, about the 1st of August, 1847, \$6 per *aroba* or twenty-five pounds. The board is therefore of the opinion, after a mature deliberation of the facts above established, that Don Juan Domercq is justly entitled from the United States, to the value of 721 bales of tobacco, being \$34,608; with legal interest thereon from the 1st November, 1847, until paid.

W. W. MORRIS,

Major United States Army, President.

H. L. KENDRICK,

Captain second artillery.

C. S. WIGHT,

Capt. 2d Illinois volunteers, recorder of the board.

[Endorsed.]

HEADQUARTERS, ARMY OF MEXICO,

Mexico, May 20, 1848.

Don Juan Domercq, a Spaniard, having claimed indemnity for losses sustained at the hands of the American army, by the seizure as Mexican property, of tobacco which he had acquired by purchase from the quartermaster's department, I thought it proper, for the information of the government, to order a board of officers to investigate and report upon the facts. This report is transmitted to the War Depart-

ment, whose decision is requested in the case, as I do not myself feel authorized to order the payment recommended by the board.

W. O. BUTLER, *Maj. Gen. Com'g.*

WAR DEPARTMENT,
Washington, March 1, 1849.

SIR: In relation to the claim of Mr. A. Port, which forms the subject of your letter of the 8th ultimo, and of the note of the minister of France therewith enclosed, I have the honor to transmit herewith, reports from General Childs and Captain C. R. Webster, who are acquainted with the circumstances under which the claim originated, together with other papers containing information upon the subject.

It will be seen that the claim of Mr. Port was submitted to the consideration of a board of officers, in Mexico, who decided that it was without merit.

The proceedings of this board, and the testimony taken, appear to have been transmitted to the United States; but, after diligent search, I regret that they cannot now be found, nor indeed, does it appear that they reached this department. Further efforts will be made to recover them.

The letter of Major General Butler, of March 7, 1848, and the paper transmitted by him, under the date of May 20, 1848, herewith enclosed, do not directly relate to this claim, but to others connected with it.

Very respectfully, your obedient servant,

W. L. MARCY, *Secretary of War.*

Hon. JAMES BUCHANAN,
Secretary of State.

HEADQUARTERS OF THE U. S. ARMY OF MEXICO,
City of Mexico, April 18, 1848.

SIR: The general commanding has the honor, to acknowledge the receipt of your communication of the 15th inst., with the accompanying documents relative to the "tobacco case" of Senor A. Port, a French citizen. I am instructed to say to you, that this matter was some time since brought before a "court of inquiry," whose decision Major General Scott, then commanding, considered final; thinking this method of settling questions by litigation, in the absence of a civil jurisdiction, the most just and satisfactory that could be resorted to, under our military occupation.

This conclusion has been fully sustained by the present general commanding.

That Mr. Port and others, might not be debarred from the privilege of a higher authority, Colonel Childs, commanding at Puebla, has been ordered to report to the War Department the nature and history of the case; and since an appeal has been made by Senor A. Port, through

the French minister at Washington, any further action in this case will come directly before the government there.

I return the documents of the party, with the instructions of the general commanding, that papers relating to this case must necessarily in future be forwarded direct to the Department; and his Excellency the French minister at Washington.

With high esteem, I am, sir, your obedient servant,

J. RUSSELL BUTLER,
Lt. & A. D. C.

His Excellency BARON SOUSY DU BESLAN,
Chargé de Affaires, &c.

I certify the foregoing to be a true copy of the original, shown to me and identified with this by my signature. Office of civil and military Governor, city of Mexico, *May 18, 1848.*

PERSIFER F. SMITH,
Bvt. Brig. Gen. & Gov.

Vouchers for the case of Mr. A. Port, relative to the affair of the tobacco, sold in Puebla by the Governor, Colonel Childs, on the 19th October, 1847.

HEADQUARTERS, MILITARY DEPARTMENT,
[Orders No. 55.] *Puebla, May 20, 1847.*

3. A quantity of tobacco, the property of the Mexican government, has been seized, confiscated, and is hereby ordered to be sold to the highest bidder. The chief quartermaster, Captain Allen, will receive written proposals until 5 o'clock p. m. of to-morrow, 21st inst., each proposal naming the quantity to be purchased.

4. From the proceeds of sales of tobacco, the property of the government of Mexico, seized, confiscated and ordered to be sold in this city, the chief quartermaster will set off three thousand dollars to the appropriation for the procurement of necessaries and comforts of the sick, and three thousand dollars for the procurement of vegetables (not included in the government rations) for the troops, both amounts to be turned over to the chief commissary. The funds to be expended on requisitions of the chief surgeons and by the chief commissary. The balance of the money will be carried to the credit of the Treasury of the United States of America.

By order of Major General Worth:

W. W. MAIKAN,
A. A. General.

ASSISTANT QUARTERMASTER'S OFFICE,
Puebla, Mexico, May 25, 1847.

I certify that I have this day sold to L. S. Hargous, esqr. 2,061 bales of tobacco, by order of General Worth, under whose order the seizure was made from the Mexican government.

R. H. ALLEN,
Captain and A. Q. M.

PUEBLA, *June 12, 1847.*

The bearer, Mr. Domercq, has purchased the tobacco in store at San Jose, and has promised to enter and remove the same at pleasure.

R. H. ALLEN,
Captain and A. Q. M.

Hevendido al Senor D. B. Juan Domercq, dosmil ochenta gren tercio d tabaco, cuyo importe de cuaventa gunmuil suscientos veinteperos, me ha pagado en letras sobre de Megico, a cargo de D. F. Marañón.
PUEBLA, *Junio 6, de 1847.* Y. S. HARGOUS.

ASSISTANT QUARTERMASTER'S OFFICE,
November 10, 1847.

I certify that on the 21st of October I sold per order of Governor Childs, 500 bales of tobacco at 24 dollars per bale.

CHAS. R. WEBSTER, *Captain and A. Q. M.*

CITY OF MEXICO, *November 1, 1847.*

MY DEAR CHILDS: A few days after my command reached and occupied Puebla, I caused to be seized a large quantity of tobacco, the property of the government of Mexico, confiscated the same, and ordered it for sale. It was sold by Quartermaster Allen, who reported to me the terms of sale, to Mr. Hargous, which I approved.

I now learn, that by your order the tobacco has been taken out of the hands of Hargous's agent and resold. If so, whatever may have been your necessities in the way of funds for public purposes, a decided wrong has been done to the purchaser. I enclose a copy of my order of the proceeds.

I am truly yours,
COL. CHILDS, *Governor of Puebla.*

W. J. WORTH.

HEADQUARTER'S, DEPARTMENT OF PUEBLA,
[Orders No. 130.] *Puebla, November 22, 1847.*

The General commanding directs that Captain Webster, Mr. Port, Mr. Abadie, and Messrs. Gambin & Co., and Mr. Gordon Mancy, report themselves at headquarters at 3 o'clock p. m., for the purpose of settling finally the business referring to a lot of tobacco in dispute.

By order of General Lane:

S. DOUGLAS,
1st Lieutenant.

ASSISTANT QUARTERMASTER'S OFFICE,
November 30, 1847.

SIR: Mr. Domercq informs me that the last buyer of the tobacco refuses to give up the key. Will you send an officer with a file of men to see that he has possession of what the court has decided is his property, and put him in quiet possession of the same without any disturbance? My interpreter goes with Mr. Domercq.

I am, sir, your obedient servant,

General LANE.

CHARLES R. WEBSTER,
Captain & A. Q. M.

HEADQUARTERS, DEPARTMENT PUEBLA,
 [Orders No. 174.] *Puebla, December 7, 1847.*

1. All persons, who have instituted legal proceedings against Alejo Port, or against any other person or persons, for and concerning certain tobacco, purchased by said Port of the depot quartermaster of Puebla, Captain Charles Webster, at public places, are hereby strictly enjoined from all further proceedings in the premises, in any court or courts of this country at their peril.

2. All persons holding writings, contracts, receipts, bills of sale or other paper or papers, conflicting with or adverse to the latter order issued from these headquarters, nullifying all such contracts, bills of sale, or other paper or papers, or transfers, are hereby ordered forthwith to deliver such contracts, transfers, bills of sale, or other papers to Lieutenant Alexander Hayes, quartermaster of this brigade.

By Order of General Lane:

T. J. WHIPPLE,
Aid-de-camp and A. A. A. General.

FLAG OF FREEDOM, Puebla, (Mexico) Wednesday, October 20, 1847:

[Extract].

HEADQUARTERS, MILITARY DEPARTMENT OF PUEBLA,
Puebla, 12th October, 1847.

To my staff, Lieutenant Waelder, A. A. A. General, and my secretary, Mr. Wingierski, I am indebted for most valuable services. They were not only employed in their official duties, but commanding troops, and by day and by night were most active and zealous. I cannot sufficiently thank these gentlemen for their services.

THOMAS CHILDS,
Colonel U. S. A., civil and military Governor.

Capt. H. L. SCOTT, A. A. A. General,
Headquarters of the army, Mexico.

FLAG OF FREEDOM, Puebla, (Mexico) Saturday, January 15, 1848

[Extract].

HEADQUARTERS, MILITARY DEPARTMENT OF PUEBLA,
Puebla, 13th October, 1847.

I have now only to speak of my A. A. A. General, Mr. Waelder, of the 1st Pennsylvania volunteers, and my secretary Mr. Wingierski.

The gallant charge of Lieutenant Waelder upon the enemy, although rash, exhibits him as an officer not to be intimidated by numbers. His duties have been arduous and dangerous, having daily to

carry orders through the thickest of the fire. I take great pleasure in recommending him to the favorable notice of the General-in-chief.

To Mr. Wingierski, secretary and translator, I am much indebted for valuable services. Mr. Wingierski, in addition to his appropriate duties, conducted the operation of the spy company, and through his suggestions and active exertions I received much valuable information, and many successful expeditions of spies into the city were made. Mr. Wingierski commanded the detachment on the roof of my quarters, and was the first man wounded. From his after efforts, his wounds proved severe and painful; still he performed his various duties night and day, and is worthy of my approbation.

THOMAS CHILDS,

Colonel, U. S. A., civil and military Governor.

To Capt. H. L. Scott, *A. A. A. General,*
Headquarters of the army, Mexico.

PUEBLA, December 14, 1847.

SIR: I am instructed by General Lane to recommend to the General-in-chief, Mr. Alexander Port, a Frenchman, and resident of this city; he has been very useful to the troops at this place, in procuring clothing, forage, &c., and has ever proved a firm friend to the Americans. Private business requiring his presence in Mexico, General Lane, deems it his duty, to recommend him to the notice of the General-in-chief.

I am, very respectfully, your obedient servant,

THOMAS J. WHIPPLE,

To Capt. H. L. Scott,
A. A. A. General.

VICE CONSOLADO DE ESPAÑA,
en Puebla.

Habiendome impuesto de la tentativa nota de V. S. 11. del actual relatiba á la cantidad de tabaco de que ha sido derpojado el Subdite Frances D. S. A. Port, quién exise la documentos que precento al General-en-Gefe de la tropas Norte Americanos (y este há remitide) para la reclamacion caitra el Gobernador militar de esta ciudad, las euales V. S. ine idica estar en esta commandancia militar: me hé apersonado en consecuencia á la Secretaria de dpa. Gobierno, y se me há manifestado que tales documentos no existen allé, y que en el caso de haberlos recibido, obrarán en poder del Sr. De Tomas Childs, Gobernador civil y militar, que hoy se halla en esa Capital, de consigniente espero el regrero de ese autoridad, para reclamarlas meramente, danod aviso enmediatamente á esa Legacion de los resultados que obtenga.

Aprovecho esta ocasion para reiterar a V. S. los seguridades de mi concideracion, y ruego a Dios ouarde a V. S. ms. ans. Puebla, Marza 16, de 1848.

MANUEL MIRANDA Y SEPTION.

Sor. D. Bamon Lasano y Armentos Secretario dela Legacion de S. M. C. y encargado interino de negocios en Megico.

I certify that the foregoing documents have been compared by me with others identified by my signatures of this date, and are found to be correct copies.

CITY OF MEXICO, *Office of Civil and Military Governor*, May 18, 1848.

PERSIFER F. SMITH,

Bvt. Brigadier General and Governor.

IN THE COURT OF CLAIMS.

J. ALEXIS PORT, *vs.* THE UNITED STATES.

Petitioner's brief.

J. Alexis Port is a French citizen, and he has resided in the city of Puebla, as a merchant of reputable and unblemished character, for more than fourteen years.

While the United States army was in possession of the said city of Puebla, in pursuance of the order of Colonel Thomas Childs, then acting as civil governor of Puebla, Captain Charles R. Webster, United States army, and acting quartermaster, advertised for sale at public auction 500 bales of tobacco. The following is the statement of Captain Webster, with a copy of the advertisement:

"I certify that I advertised the sale of tobacco on the 16th October, for the 19th October, by causing the notes (notices) of such sale, in Spanish and English, to be publicly fixed and placed on the corners of the principal streets and thoroughfares of this city; and I further certify that the following is a true copy of the original in Spanish, and was taken from some public place after the sale of said article."

CHAS. R. WEBSTER,

Cap. and A. Q. Master.

The following is the translation of the advertisement:

"On the 19th inst., there will be sold at public auction, at 3 o'clock in the afternoon, at the quartel San Jose, 500 bales of tobacco."

Port became the purchaser of said tobacco at \$24 per bale, amounting to the sum of \$12,000; and paid for the same the sum of \$8,000 in cash, and by a credit to the United States in account with him the sum of \$4,000; the United States being at the time indebted to him for supplies furnished the army.

The following is the certificate of Captain Webster:

"I certify, that on the 21st of October, I sold, per order of Governor Childs, 500 bales of tobacco, at \$24 per bale.

"CHAS. R. WEBSTER,

"Capt. and A. Q. M."

"NOVEMBER 10, 1847, *Ac. Q. M. Office.*"

The petitioner, on the 27th of the same month of October, sold the said tobacco to Señor Don Juan Abadie, merchant of said city, at \$33 per bale, amounting in all to 16,500 dollars.

On the 13th November, 1847, Señor Abadie sold the same tobacco to Messrs. Gamio & Co., of the city of Mexico, for \$35 per bale, amounting to \$17,500, accompanied with a warranty that the tobacco was his legitimate property, and that he would present the proper documents and certificates of the American authorities, so that the sale might have no obstruction, and the property might be removed at pleasure without any impediment whatever, and that the seller should be responsible to close up any difficulty which might arise.

And on the 15th November Messrs. Gordon & Murray purchased this tobacco at \$48 per bale of 214 pounds, amounting to \$21,000, for which they paid in cash, and the seller warranted the sale against any difficulties which might arise.

The petitioner, after the sale by him of the tobacco purchased as aforesaid, was informed that the tobacco was claimed by a merchant of Puebla, of the name of Domercq, and on the 1st November, 1847, General Worth addressed a letter to Colonel Childs, on this subject, in which he remarks: "I now learn that by your order the tobacco has been taken out of the hands of Hargous's agent and resold. If so, whatever may have been your necessities, in the way of funds for public purposes, a decided wrong has been done to the purchaser," &c.

On 17th November, 1847, by order of General Lane, a board of inquiry, consisting of four officers of the army, was convened at Puebla for the purpose of examining into the matters. They had before them a communication from Mr. Domercq and the petitioner, and examined as witnesses Colonel Childs and Captain Webster. The majority of the board declare that "they are of opinion that the 500 bales of tobacco sold by Captain Webster to Mr. Port were not at the time of the said sale the property of the United States, and award the possession and ownership thereof to him the said Domercq, and that the quartermaster, Captain Webster, pay to Mr. Port \$8,000, with interest from the date of its payment to him, and cancel the credit of \$4,000 to the United States in its account with Port for clothing, &c., supplied."

On the 30th of said November, Captain Webster addressed a letter to General Lane, stating that Mr. Domercq informed him that the last buyer of the tobacco refused to give up the key, and requested that he would send an officer with a file of men to see that he has possession of what the court had decided was his property, and put him in quiet possession of the same without any disturbance; and in pursuance of this request the tobacco was forcibly seized and delivered to Mr. Domercq.

It is not contended, that, at the time of the several sales and transfers of the tobacco as aforesaid, the price at which the tobacco was sold was above the fair market price at the time in the city of Puebla, nor that it was not worth, when seized by the order of General Lane, at least the sum claimed by Messrs. Gordon & Murray, the last purchasers.

It appears from the statement of Mr. Domercq himself, that after the purchase of the tobacco by the petitioner, and before the sale by him, he offered to the petitioner to purchase it at \$31 or \$32 per bale; and General Lane, in an order confirming the doings of the board of inquiry, directs—

“3. That the quartermaster, Capt. Webster, cancel the credit of \$4,000 now at the credit of the United States against Port on his books.

“That the quartermaster, Capt. Webster, retain the sum of \$8,000 paid by him to Port until evidence to his satisfaction shall have been furnished that all the purchasers subsequent to Port shall have been refunded the amount respectively paid by them in the sale and resale of said tobacco.

“5. It is made the special duty of the quartermaster, Capt. Webster, to give immediate notice to parties interested, and to see this order carried into effect.”

In view of the foregoing facts the petitioner claims that he is entitled to compensation from the United States for the damages which he has sustained by the acts of their own officers; that as he has been subjected to the necessity of making full compensation to the subsequent purchasers for the losses sustained by them successively, as well as to the direct injury arising from annulling the contract of sale, that for such loss and damage he should be fully indemnified; and as it is understood to be the practice in demanding of other nations redress for injuries to its citizens and is just in itself, that interest be allowed, and such further damages as he has actually sustained.

It is also claimed that the title acquired by him was a valid title, and would be sustained before any court acting under the law of nations; that the seizure and sale of the property of an individual domiciled in Mexico during the war with that nation would vest the property in the purchaser; that it was not the duty nor the right of your petitioner to sit in judgment upon the acts of the commander of the American forces, nor to determine to what extent he should exercise the acknowledged rights of a belligerent; that the question as to the degree of mildness or severity with which the war should be prosecuted was a national question, and that the petitioner was authorized to purchase property publicly offered for sale by the commander of the American forces, whether the same had been seized by him as the property of the nation or of individuals.

If the former owner of the tobacco in question, Mr. Domercq, should have instituted a suit before the courts of the United States against the petitioner for the value of the tobacco on the ground that the seizure and sale had been illegal and void, upon no principle could the claim be sustained, and still less is it consistent with justice and good faith for a nation thus to annul without just compensation its own contracts.

It is apparent, too, that the same view was entertained by all parties at the time the sale was made. Even the former owner of the tobacco himself regarded the title of your petitioner as valid,

and proposed to purchase of him the tobacco which he had formerly owned.

From all the proofs in this case it is perfectly apparent that the sale was made publicly in open market, and that the purchase was made in entire good faith; that the purchase-money was paid and the article delivered, and that the contract has been rescinded without any fault on the part of the petitioner.

As there is not the slightest proof of any kind or ground for suspicion of any unfairness on the part of the petitioner, he might safely rest his case on the facts above stated, which are proved undeniably by the evidence in this case.

But Col. Thomas Childs, U. S. A., and then governor of Puebla, in his testimony before the board of officers, gratuitously and unjustly assailed the reputation of the petitioner; and by the expression of a suspicion of fraudulent collusion between the petitioner and his own secretary, has not only greatly prejudiced the claim of the petitioner for redress for the breach of contract, but has assailed his reputation, and among those to whom he was unknown has injured his character for integrity, never before questioned.

The imputation, based merely on suspicion, is not only made without proof, but the proof shows it to be wholly unfounded.

Col. Childs says: "Witness is of opinion that the present claimant, Port, was in collusion with the secretary and interpreter in the tobacco purchase, and both Port and secretary and interpreter had been employed in an infamous attempt to speculate on the tobacco to the injury of the former purchaser, Domercq. His reason for this opinion is, that so large a quantity of tobacco could not have been sold in Puebla without the fact being known to all the tobacco dealers. The secretary and interpreter died subsequently to the sale made by the quartermaster. Has every reason to believe that the secretary and interpreter were to receive two dollars per bale from the last purchaser (Port,) and has been informed that \$1,000 was due to the estate of Wingierski by Port, which witness has not yet collected, as he has been waiting the issue of the matter now pending before the court; witness has no positive knowledge that Port was cognizant of the original sale."

Never were such serious charges before made without the pretence of any proof.

The only ground for this opinion is, that "so large a quantity of tobacco could not have been sold at Puebla without the fact being known to all the tobacco dealers."

In the first place, it is proved by a number of witnesses that, at the time and before and after that sale was made to Domercq, the petitioner was absent from Puebla. In the next place, his business was not that of a tobacco dealer. But we respectfully but confidently contend, that it is entirely immaterial whether he did or did not learn that this tobacco was the property of Domercq at the time it was seized by the officers of the United States. It appears from the statement of Col. Childs himself, that "at that time there was no money in the quartermaster or any other department; and Gen. Worth, in his letter of the 1st November to Col. Childs, understood that the prop-

erty had been seized for the purpose of supplying the necessary funds. He says: "Whatever may have been your necessities in the way of funds, a decided wrong has been done to the purchaser," &c.

Doubtless Colonel Childs considered that the necessity of the case justified him in seizing and selling private property in order to supply the necessary funds.

Certain it is that the United States publicly and forcibly did seize the private property of Domercq, and after due notice, publicly sold it. Whether this act of seizure and sale of the property of an individual is justified by the circumstances, is not important. It surely is a strange charge to make by the officer seizing and selling the goods, that the purchaser, if he knew who the former owner had been, would be guilty of fraud.

But Colonel Childs charges his secretary and interpreter with fraudulently and falsely interpreting the communications from Mr. Domercq to him. It is no part of our duty to vindicate the character of this person, who at the time when the charges were made was deceased; but it is proper to observe that Colonel Childs, in a communication to Capt. Scott, a. a. a. gen., of the 12th of October, 1847, published in the "Flag of Freedom" of the 20th of October, the very time of these transactions, says: "To my staff, Lieutenant Waelder, a. a. gen., and my secretary, Mr. Wingierski, I am indebted for most valuable services. They were not only employed in their official duties, but commanding troops, and by day and night were most active and zealous. I cannot sufficiently thank those gentlemen for their services." And on the 13th of October, 1847, in another communication addressed to the same officer, published in the "Flag of Freedom" of 15th of January, 1848, he says: "To Mr. Wingierski, secretary and translator, I am much indebted for valuable services. Mr. W., in addition to his appropriate duties, conducted the operations of the spy company; and through his suggestions and active exertions I received much valuable information, and many successful expeditions of spies into the city were made. Mr. W. conducted the detachment on the roof of my quarters, and was the first man wounded. From his after efforts his wound proved severe and painful; still he performed his various duties night and day, and is worthy of my approbation."

The reasons of Colonel Childs for supposing that this person had been guilty of fraud are not given, nor any fact to sustain the charge; but whether the charge against the deceased secretary is well or ill founded, in no way affects the character of the petitioner.

Although Colonel Childs says that he has "reason to believe" that there was a corrupt agreement between your petitioner and his secretary, by which the secretary was to receive \$1,000, and that he waited the issue of the matter then before the court before collecting it of the petitioner, yet he has never made any such claim of the petitioner, nor shown the slightest reason of his belief of this most groundless imputation.

Not only is there the absence of the slightest evidence to show any collusion or connexion of any kind between the secretary and the petitioner, but the testimony is direct and positive that at the time

when these communications were made by Mr. Domercq through the secretary, he was and had been long before that time absent from the city of Puebla, and returned to that city from Atlisco on the 14th day of October, having been absent from Puebla between that time and the 10th of September previous.

In addition to this, we would refer to the testimony of Captain Webster, who was personally conversant with the entire transaction, as given before the board of officers. He says: "Witness thinks there could have been no dishonest collusion between Port and Wingerski; has had many transactions with Port, and always found him upright and honest in his dealings."

In order to sustain the reputation of Mr. Port as a man of integrity, and a merchant of reputable standing, we ask the attention of the court to a certificate signed by a large number of the principal citizens of Puebla, and duly authenticated. They say, "that since the year 1836, when Mr. Alejo Port, a French citizen, settled in this city, he has observed a very proper conduct, exhibiting in all his commercial transactions an honor, legality, and good faith, without the slightest fault being perceptible in him."

And after all these transactions, and nearly a month after the approval of the doings of the board by General Lane, that officer causes the following letter to be written:

"PUEBLA, *December* 14, 1847.

"SIR: I am instructed by General Lane to recommend to the General-in-chief Mr. Alexander Port, a Frenchman, and resident of this city. He has been very useful to the troops at this place in procuring clothing, forage, &c., and has ever proved a firm friend of the Americans. Private business requiring his presence in Mexico, Gen. Lane deems it his duty to recommend him to the notice of the General-in-chief.

"I am, very respectfully, your obedient servant,

"THOS. J. WHIPPLE.

"Captain H. L. Scott,

"A. A. A. General."

In view of the foregoing facts, the following points of law are presented:

The well settled principle of the law of nations clearly shows that the claim of the present petitioner is not only a highly equitable, but strictly legal claim.

Vattel's Law of Nations, book 3, ch. 9, § 164. "As the towns and lands taken from the enemy are called conquests, all movable things constitute the *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests; for he alone has such claims on the enemy as warrant him to seize on his goods and appropriate them to himself."

Burlamaqui, ch. 7, § 11, p. 377. "Besides the power which war gives to spoil and destroy the goods of an enemy, it likewise confers the right of acquiring, appropriating, and justly retaining the goods we have taken from him," &c.

Id., ch. 7, § 14, p. 377. "With respect to movable effects, as they may easily be transferred by commerce with the hands of the subjects of a neutral State, often without their knowing that they were taken in war, the tranquillity of nations, the good of commerce, and even the state of neutrality require that they should ever be reputed lawful prizes and the property of the power of whom we hold them."

§ 15, p. 378. "Here a question arises: When is it that things are said to be taken by right of war and justly deemed to belong to him who is in possession of them? Grotius answers, as a civilian, that a man is deemed to have taken movable things by the right of war so soon as they are secured from the pursuit of the enemy; or when he has made himself master of them in such a manner that the first owner of them has lost all probable hopes of recovering them," &c.

§ 26, p. 380. "Another question is, whether things taken in a public and solemn war belong to the State or to the individuals who are members of it, or to those who made the first seizure? I answer, that as the right of war is lodged in the sovereign alone and undertaken by his authority, everything taken is originally and primarily acquired to him, whatever hands it first falls into."

Vattel, book 3, ch. 14, § 212, p. 461. "When a town surrendered to the enemy's army is retaken by those of its sovereign, it thereby, as we have just seen, becomes restored to its former condition, and therefore to all its rights. It is asked, whether it thus recovers such of its possessions which have been alienated by the enemy when he became master of it? First, we are to distinguish between movable goods not tenable by the right of postliminium and immovables. The former belong to the enemy who gets them into his hands, and he may alienate them instantly."

Chitty's Law of Nations, 97. "As to things movable we find by the same section that the law is otherwise. And this, indeed, is of course; for as movable property according to the law of nations is held to be irrecoverable by the original owner in virtue of any postliminium, whenever it has passed into the complete possession of the enemy; much less is such property to be protected from the effect of postliminium when it has not only passed into the complete possession of the enemy, but been by him transferred bona fide to a neutral." (See also 2 Wooddes, p. 441, sec. 34.)

Puffendorf, book 8, ch. 6, § 20. "But by the practice of the world a man makes himself absolute and perpetual master and proprietor of everything he takes from his enemy in a solemn war."

Grotius, lib., 3, ch. 8, § 4. 1. "Sicut autem res, quæ singulorum fuerant, jure belli iis acquiruntur qui eos sibi subjicerent."

Id. lib., 3, ch. 9, § 14. "De mobilibus generalis in contrarium regula est ut postliminio non redeant, sed in præda sint."

1. The title of the property of Domercq seized by Colonel Childs and sold, vested at once in the purchasers, and he thereby acquired a valid title.

It is not material whether it was known or not to Colonel Childs or to Port that the property belonged to Domercq.

By the right of war, the property of individuals seized by the conquering nation becomes the property of the conqueror, and if sold by

him, a good title was passed and the contract of sale could not be recinded. (Marten's Law of Nations, 289)

Whether Domercq could or could not have redress against Colonel Childs or the government, is immaterial, and cannot affect the title to the property which passed by the sale.

If an illegal seizure is made on the ocean and the property condemned and sold by a decree of a court of admiralty the injured person has a remedy against the government guilty of the aggression; but the sale by the order of the court is clearly good, and passes the title.

Maisonnain et al. vs. Keating, 2 Gallison Rep., 334 :

“ The legality of a capture may, under circumstances, exclusively depend upon the ordinances of the government of the captors. If, for instance, the sovereign should, by a special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt that it would afford a complete justification of the captors in all tribunals of prize.”

“ The acts of subjects, done under the orders of the sovereign, are not cognizable by foreign courts. If such acts be a violation of neutral rights, the only remedy is by an appeal to the sovereign, or by a resort to arms.” (Idem.)

“ A capture, therefore, under the Berlin and Milan decrees or the celebrated Orders in council, although they might be violations of neutral rights, must still have been deemed, as to the captors, a rightful capture, and have authorized the exercise of all the usual rights of war. It is quite another question whether a tribunal of prize would lend its aid to enforce such captures, though perhaps, in the strictness of national law, it would be bound to abstain from all obstruction of the captors.” (Idem.)

These views, as to the law applicable to this case, are fully sustained by unanimous decision of the court already made in this case, as follows :

The opinion of the court was delivered by Chief Justice GILCHRIST.

“ The facts in this case, as they are stated in the petition, are, that on the 12th day of September, 1847, Colonel Childs, the officer commanding at Puebla, ordered Captain Webster to “ sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed.” In obedience to this order, Captain Webster advertised, on the 16th of October, for sale at auction on the 19th of October, five hundred bales of tobacco. On the 21st day of October, the claimant purchased the tobacco for the price of twenty-five dollars per bale, amounting to the sum of twelve thousand dollars, for which he paid \$8,000 in cash, and gave the United States credit for \$4,000, they being then indebted to him for supplies furnished the army.

The first question that arises is, what are the rights and liabilities of the claimant and the United States after the sale of the tobacco and the payment of the price by the claimant?

In this case there were all the elements necessary to constitute a contract. The United States and Mexico were at war. The American army was in actual possession of a considerable portion of Mexico,

and, by the law of nations, had a right to seize the property of the Mexican government as lawful prize. Colonel Child's had, for the time being, supreme civil and military authority in the military department of Puebla, and in his then existing capacity he represented the United States, whose officer and servant he was. His authority, as the head of the army, could not be resisted; for this was especially a case where, from necessity, the laws must be silent in the presence of a victorious army.

The principles regulating the rights of nations at war, when an army is in possession of an enemy's country, are clearly established by the writers on the law of nations. "When the sovereign or ruler of a State declares war against another sovereign, it is understood that the whole nation declares war against another nation." * * Hence, these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other."—Vattel, b. 3, ch. 5, § 70. "Everything, therefore, which belongs to that nation, to the State, to the sovereign, to the subjects, of whatever age or sex—everything of that kind, I say, falls under the description of things belonging to the enemy."—Ibid., § 73. "We have a right to deprive our enemy of his possessions, of everything which may augment his strength, and enable him to make war."—Ibid., b. 3, ch. 9, § 161. "As towns and lands taken from the enemy are called *conquests*, all movable property taken from him comes under the denomination of *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests, for he alone has such claims against the hostile nation as warrant him to seize on her property and convert it to his own use."—Ibid., § 164. "The property of movable effects is vested in the enemy from the moment they come into his power."—Ibid., b. 3, ch. 13, § 196. As to movables captured in a land war, it has been sometimes stated to be merely requisite that the property shall have been twenty-four hours in the enemy's hands; but other writers hold that the property must have been brought *infra præsidia*—that is, within the camps, towns, ports, or fleets of the enemy; and others have drawn lines of an arbitrary nature.—Marten's Law of Nations, 290, 291; 2 Wooddes, Vin. L., 444, § 34. But in respect to maritime captures, a more absolute and certain species of possession has been required, in order to obviate the right of postliminium, such as a sentence of condemnation, to give a neutral purchaser a title to a prize vessel.—Case of the Flad Oyen, 1 Rob., 134; 8 T. R., 270. "Immovable possessions, lands, towns, provinces, &c., become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the State to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect." (Vattel, b. 3, ch. 13, § 197.) The conqueror who takes a town or province from his enemy cannot justly acquire over it any other rights than such as belonged to the sovereign against whom he has taken up arms. War authorizes him to possess himself of what belongs to his enemy; if he deprives him of the sovereignty of that town or province he acquires it, such as it is, with all its limitations and modifications.—Ibid., § 199.

In a condition resulting from a state of war, if property be seized, under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authorities ; but no action can be maintained against the party who has taken it in a court of law. In England no municipal court, whether of common law or of equity, can take cognizance of any questions arising out of hostile seizure.—*Le Caux vs. Eden*, 2 Dougl., 573. So, if booty be taken under the color of military authority by an officer under the supposition that it is the property of a hostile State or of individuals which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure ; it can be judged of only by an authority delegated by his majesty, and by his majesty ultimately, assisted by the lords in council. There are no direct decisions on such questions, because, as stated by Lord Mansfield, in *Lindo vs. Rodney*, Dougl., 313, they are cases of rare occurrence.—*Le Caux vs. Eden*, Dougl., 592.

It is to be remembered that we are now examining this case upon the supposition that the allegations in the petition are true, and the general question is, whether, supposing them to be true, a proper case is presented for the taking of testimony. The United States were in possession of a quantity of tobacco captured from the enemy during the war with Mexico. Under this general question the first inquiry is, whether, when a person sells personal property in his possession, there is an implied warranty that he has a title to such property.

In most of, if not all, the cases in this country, wherever the question has been raised, it has been held that in every sale of personal property there is an implied warranty of title. Some of the decisions to this effect are, *Defreeze vs. Trumper*, 1 Johns., 274 ; *Bayard vs. Malcolm*, *ibid.*, 469 ; *Rew vs. Barber*, 3 Cowen, 280 ; *Case vs. Hall*, 24 Wend., 102. In *Vibbard vs. Johnson*, 19 Johns., 78, it is said : “There is no doubt that in every sale of a chattel for a sound price there is a tacit and implied warranty that the vendor is the owner, and has a right to sell.” In *Coolidge vs. Brigham*, 1 Metc., 551, the court said : “In contracts of sale warranty is implied. The vendor is always understood to affirm that the property is his own. This implied affirmation renders him responsible if the title is defective. In *Boyd vs. Bopst*, 2 Dale, 91, it was said by the court : “The possession of chattels is a strong inducement to believe that the possessor is the owner, and the act of selling them is such an affirmation of property that on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller.” There are numerous other cases to the same effect, which need not be particularly adverted to for the present purpose. The same doctrine is stated in *Story on Contracts*, § 535, where numerous English cases are cited by the author in support of his position.

In the 1 Law Reporter United States, 272, there is a careful and discriminating analysis of the decisions upon this point by Mr. Pike, of Arkansas, in which the writer comes to the conclusion that the law of England on this subject is like the civil law, and that there is an implied warranty, not of title, but of undisturbed possession and enjoyment. It is immaterial in the present case what is the precise character of the implied warranty, whether it be one of title or of peaceable

possession only, because the United States were not only in possession and sold the property, but it has been taken from the possession of the purchaser, who is seeking to recover damages for the breach.

In judicial sales, where property is sold by the marshal under an order of court, it is held that no warranty is implied. (*The Monte Allegre*, 9 Wheat., 644.) But this was not a judicial sale. It was simply a sale by the United States, acting through their officers in an enemy's country, of property in their possession to which they claimed a title by the rights of war; and we see no reason why they should stand in any better position, in regard to property in their possession than a private citizen. The sale was in obedience to an order from the commanding general to his military subordinate. We cannot regard the general as a court of law, or Captain Webster as an officer of a court; for this would tend to confound all the distinctions that exist between a state of peace and a state of war in regard to the rights of property.

If, then, there be nothing in the other facts in the case to alter or modify the conclusion, the claimant must be held to have established a right of action against the United States.

But the counsel for the claimant puts his case upon still another ground. He contends that the tobacco belonged to the United States by the rights of war and of conquest; that they sold it to him, and then took it away from him, making him thereby liable in damages to his vendees.

That upon the facts stated in the petition we must consider the tobacco as properly captured in war by the army of the United States, we think there is no doubt. It was taken by an authority which, for the time being, was supreme. Mexico, so far as it was actually occupied by a competent military force, was for the time a conquered country. In the rights of conquest all ordinary civil jurisdiction and remedies were merged. In all that the commanding officer did, so far as he was justified by the law of nations, he represented the country by whose authority he was in command of a military force. It was by this authority, under the law of nations, that the tobacco must for the present be considered to have been captured, and also that it was the property of the enemy. When captured, it was not the private property of the captor, but it became the property of the sovereign, according to Vattel—in this country of the United States. The people, acting through the only agents who could, from the necessity of the case, be recognised—that is, the officers in command—sold it to the claimant, who paid the consideration for it. It then became *his* property, and, after such a sale and payment, the United States had no greater right to take the property into their possession, without indemnifying those who might have a claim to it, than any individual would have to take property from his vendee on the ground that he had no right to sell it.

It appears from the petition, that, after the sale of the tobacco, the petitioner was informed that it was claimed by a merchant of Puebla, by the name of Domercq, and that a board of inquiry was convened by order of General Lane, consisting of four officers of the army, for the purpose of examining into the matter, a majority of whom reported

that the tobacco was not at the time of the sale the property of the United States, and they awarded the possession and ownership thereof to Domercq, and that the consideration paid by the claimant should be returned to him, which was accordingly done. Subsequently, upon its being reported to General Lane that the last buyer of the tobacco refused to give up the key of the store-house, an officer and a file of men forcibly seized and delivered the tobacco to Domercq.

This must be considered as the act of the United States. It stands on the same ground with the sale of the tobacco. The United States, through their officers, were in the actual possession of the supreme civil and military authority. With such a responsibility upon him, the commanding officer must *ex necessitate* act with promptness and decision. In a state of war, where the ordinary tribunals are silent, a nation must expect to incur the risk of pecuniary liability for the acts of its officers in a foreign country, whose course of conduct must be determined by what seems best under existing circumstances. It would be unreasonable in the extreme to require of military officers, carrying on war abroad, placed in difficult and trying positions, either the experience or the legal skill that would enable them to appreciate the subtle distinctions which at home, and in a time of peace, are applied to the ascertainment of legal rights. It is a necessary consequence of a state of war that the orders of the general can admit neither of argument nor resistance. It is the *nation* that carries on the war, and not the individual officer; and it follows that the nation must be liable for the acts of such agents as it sees fit to employ in the prosecution of its object.

Our conclusion is, that if the allegations in the petition are proved, the claimant is entitled to some damages from the United States. Whether the claimant is entitled to recover any sum beyond the consideration paid by him, by reason of his liability to subsequent vendees, is a question which can more conveniently be examined when all the evidence relating to damages is laid before us. At present, we shall merely order testimony to be taken."

It thus appears that the title acquired by Port, the petitioner, was clearly a valid and legal title; that the various transfers by which the property came at last into the hands of the last holders were also legal and valid conveyances, and that the acts of the United States authorities in Mexico were wholly illegal, and that the government is bound to make compensation for the damages actually sustained. As a consequence of their act, Mr. Port has been subjected to serious loss and damage. Not only has he been obliged to refund the amount of the profit paid on the sale to Abadie, but has been subjected to the damages successively sustained by the several parties to which the sales were made, and for the full amount of which he has been held liable. The rule in relation to governments, as in relation to individuals, is, that the party who suffers an injury of this character shall be fully indemnified for the loss and damage sustained as the direct consequence of the wrongful act. The technical rules at law in relation to the damages in case of failure of title to personal property on an express or implied warranty, do not apply. Here there was no failure of title; the

tobacco sold became absolutely the property of Port, and subsequently of those to whom he made sale; and the subsequent seizure was wrongful, and is not rendered any less so by the unsuccessful attempt on the part of some officers of the government, without proof or just ground of suspicion, to assail the character of the person injured.

JOHN A. ROCKWELL,
Of Counsel for Petitioner.

IN THE COURT OF CLAIMS.

J. ALEXIS PORT *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for damages arising under a contract by which he purchased certain tobacco in Mexico which had been seized by the commanding officer at Puebla, but of which he was deprived by General Lane when subsequently in command.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. When the American army took possession of Puebla, the Mexican government had at that place 2,081 bales of tobacco which was seized by said army by order of Gen. Worth and confiscated for the use of the United States. (Finding of the court, Record, p. 45; evidence of Seniriento, Record, p. 40; Gen. Worth's Order No. 55, May 20, 1847, Record, p. 48.)

Second. That this tobacco was sold by Capt. Allen to Hargous, about June, 1847, who subsequently sold it to Don Juan Domercq, a Spanish citizen, who took possession of the same.

The court convened to inquire into and determine this matter, found as follows:

“When General Worth entered Puebla, in May, 1847, he seized and caused to be sold upwards of 2,000 bales of tobacco owned by the Spanish government. Hargous became the purchaser, and subsequently sold 2,081 bales of it to Don Juan Domercq, a Spanish citizen. He delivered 1,325 bales at the quartel San José, and the remainder in different parts of the city.” (Record, p. 45; evidence of Seniriento, Record, p. 40; evidence of Dr. Schadler, Record, p. 42; evidence of Busbor, Record, p. 44; Gen. Worth's order, Record, p. 48; Captain Allen's bill of sale and certificate, Record, p. 48.)

Third. That the court, upon full hearing, found that a large quantity of the tobacco purchased by Domercq had been sold, or used or destroyed by the American officers and soldiers, and they awarded him \$34,608, with legal interest, to indemnify him therefor. (Record, p. 46.)

Fourth. That Col. Childs, not knowing that the tobacco had been sold by Capt. Allen, and believing that it still belonged to the United States as a seizure, advertised it for sale, at public auction, on the 19th of September, 1847.

On the 12th of September, 1847, Col. Childs made the following order :

“ Captain Webster, a. q. m., will sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed.” (Record, p. 29.)

Capt. Webster advertised as follows :

“ On the 19th instant there will be sold at public auction, at three o'clock in the afternoon, at the cuartel San José 500 bales of tobacco.” (Record, p. 29.)

Colonel Childs says, in his report of February 23, 1848, that his evidence before the court convened at Puebla was entirely correct ; and in that he stated :

“ Supposing the tobacco to be the property of the United States, witness directed the quartermaster to sell the same.” (Record, p. 35.)

Fifth. The tobacco was sold, either directly, or through second hands, to Port (but which is not certain) for \$24 per bale.

Captain Webster, before the special court at Puebla, testified “ that, by order of Col. Childs, he sold (500) five hundred bales of tobacco. The price agreed on with Wingierski was (22) twenty-two dollars per bale, but Wingierski never paid the money, nor took possession of the tobacco, nor in any other way exercised right of property. Wingierski told witness he had sold the tobacco at (\$24) twenty-four dollars per bale to Port. Soon after, (witness thinks the same day,) Port came to witness and told him he would take the tobacco at (\$24) twenty-four dollars per bale ; told Port he might have it. Port paid eight thousand dollars in cash, and the balance was passed to the credit of the United States against Port for supplies of clothing, &c., which he was then and now is furnishing for account of the United States. The tobacco was the same now in controversy before the court.” (Record, p. 28.)

Spencer, the interpreter before the court in Domercq's case, testified, that after the siege, when some of the tobacco had been used as breast-works and otherwise, “ Colonel Childs instructed Captain Webster to advertise the tobacco stored in the quartel for sale ; and I wrote the advertirements and had them put upon the corners of the streets. 500 bales of the tobacco were sold to Wingierski at \$22 per bale ; and Wingierski, shortly afterwards, sold it to Port at \$24 per bale. I delivered the 500 bales to Port on the 22d of October, 1847, by order of Captain Webster.” (Record, p. 44.)

Both of these witnesses agree that the sale was first made to Wingierski, and that the final delivery was to Port. Webster says Wingierski failed to pay, and he resold to Port at two dollars higher price ; while Spencer says that Port bought of Wingierski. If the latter was the purchaser, and sold his purchase to Port, then Port has no claim upon the government upon his own grounds.

Mr. Marcy, then Secretary of War, thus states the matter :

“ It appears incidentally in the proceedings of a board of officers at Puebla, that this tobacco was a part of a quantity belonging to one Domercq, which was seized by General Childs under the belief of its being the property of the Mexican government, and after the siege of Puebla was sold by you (Capt. Webster) at a public sale to one Win-

gierski, and by him to Mr. Port; subsequently, on the claim of the owner, Domercq, it was taken from Port and delivered up." (Record, p. 24.)

Fifth. On ascertaining that the tobacco did not belong to the government at the time of the sale, but to the assignee of its vendee, Port was forbidden to sell the tobacco, and it was finally taken by the agents of the United States and delivered to Domercq, the real and true owner.

Spencer testified:

"I delivered the 500 bales to Port on the 22d of October, 1847, by order of Captain Webster. On the 23d day of October, 1847, Colonel Childs ordered the sales of the tobacco to be stopped, and on the 25th October, 1847, I was ordered by Colonel Childs, through Captain Webster, to deliver to Mr. Domercq the remainder of the tobacco on hand.

* * * * In November I went with a detachment of men to Port's house, under the order of General Lane, and upon being refused the keys, burst open the doors and took the 500 bales of tobacco sold by Wingierski to Port, and delivered it to Domercq." (Record, p. 44.)

Captain Webster addressed the following letter to Port under date of the 30th of October, 1847:

"SIR: You will please suspend the sale of tobacco purchased of me for the present. You are perhaps aware that the whole is claimed by Señor Domercq." (Record, p. 29.)

Sixth. On the 17th of November, 1847, General Lane ordered a court of inquiry, consisting of Colonel Brough, Colonel Dumont, and Captain Pugh, "to inquire into the merits of certain claimants to a lot of tobacco recently sold by Captain Webster, quartermaster." (Record, p. 24.)

Major Young was subsequently substituted in place of Colonel Brough, who was ill. (Record, p. 25.)

Seventh. The court assembled, the parties (Domercq and Port) appeared and presented their claims in writing; witnesses were heard, and the court determined that the tobacco was legally the property of Domercq, and that it should be given up to him, and that Captain Webster repay to Port the \$8,000, and recredit him the \$4,000 which had been charged to him in account to make up the \$12,000 which he had paid for the same. (Record of proceedings, Record, pp. 25 to 28.)

"The claims of both parties were then read, having been presented in writing, (see documents marked A and B,) and the court proceeded to the examination of witnesses." (Record, p. 25.)

Colonel Childs, Domercq, and Captain Webster were sworn. (Record, pp. 25, 28.)

Port appeared and cross-examined Colonel Childs. (Record, p. 27.)

The opinion of the court was as follows:

"They are of the opinion the (500) five hundred bales of tobacco sold by Captain Webster to Mr. Port were, at the time of the said sale, the property of Mr. Domercq, and not the property of the United States, and award the possession and ownership thereof to him, the said Domercq, and that the quartermaster, Captain Webster, pay to Mr. Port eight thousand dollars, (\$8,000,) with interest from the date of its payment to him, and cancel the credit of four thousand dollars.

(\$4,000) to the United States in its accounts with Port for clothing, &c., supplied." (Record, p. 28.)

Domercq's statement is at p. 30 of the Record, and Port's at p. 33.

Eighth. General Lane approved of these proceedings.

Webster says: "General Lane approved the proceedings and ordered me to carry them into effect." (Record, p. 77.)

Ninth. When Port bought this tobacco he knew that it belonged to Domercq, and not to the United States, though the officer ordering the sale and the one selling did not know that fact.

On the hearing between Port and Domercq the latter was sworn at Port's request and testified:

"The first time I ever heard anything on the subject, (the tobacco,) was one day when Port called, in my hearing, to the son of the Spanish consul, and asked him if he did not wish to join him in the purchase of the tobacco; the reply was, 'no, for it is the property of a friend, and you will make yourself liable for reclamations.' Some day or two after Port told witness he had purchased five (500) hundred bales of tobacco, and asked him if he did not wish to join him in the purchase; to which he replied in the negative, for he did not wish to purchase his own property. Port answered that that made no difference, that he could always interpose his claims." (Record, p. 27.)

Colonel Childs, in his letter of February 23, 1849, says:

"Wingierski was my secretary and interpreter. He knew full well that the tobacco did not belong to the United States; for Domercq told him so, and wished to see me on the subject, but was refused admission by Wingierski under the plea that I was engaged. Mr. Port must have known that this tobacco had been sold but a few months before. He must have known that all the tobacco in Puebla had been seized by General Worth, and publicly sold." (Record, p. 34.)

Colonel Childs in his letter of February 23, 1848, says:

"That I am convinced that both my secretary and Mr. Port knew that this tobacco had been sold by Captain Allen, and that the fact was kept from me for fraudulent purposes, and finally hastened, in my opinion, the death of Mr. Wingierski, when he found out that the facts of the case had come to my knowledge from other sources; therefore I do not consider Port entitled to damages." (Record, p. 35.)

Tenth. The tobacco was purchased by Port at one-half of its actual value.

Port states that he purchased the tobacco at \$24 per bale. (Record, p. 3.) It was worth twice that sum, as proved before the court assembled at Puebla, and Domercq was compensated at this rate.

"The board also find that 8 *arobas* constitute a bale of tobacco, and that tobacco of the same quality as that lost by Domercq was worth, about the first of August, 1847, \$6 per *aroba*, or 25 pounds." (Record, p. 46.)

Eleventh. There is no proper evidence that Port sold, or sustained any damage by selling, the tobacco in question, or otherwise; but that, on the contrary, it remained in his possession at the time that it was taken and delivered to Domercq, the true owner.

Mr. Port, in his petition, says he has been "subjected to the necessity of making full indemnification to subsequent purchasers for the losses sustained by them, respectively, as well as the direct injury arising from the annulling the contract;" but he furnishes no evidence that he had sold or had been compelled to pay any such loss or damage. The unsigned papers at p. 13 of the record prove nothing, nor would they prove anything if they were signed, and the signatures proved to be genuine. No witness testifies to the fact that Port had sold or paid anything whatever to any body.

Twelfth. There are circumstances which tend to show that he was not liable at all for any subsequent sale; but if he had been originally so liable, that he did not remain so liable.

On the 22d of November, 1847, General Lane made the following order:

"The general commanding directs that Captain Webster, Mr. Port, Mr. Abadie, and Messrs. Gambia & Co., Mr. Gordon Maney, report themselves at headquarters, at 3 o'clock p. m., for the purpose of settling finally the business referring to a lot of tobacco in dispute." (Record, p. 49.)

On the 7th of December, 1847, General Lane made—connected with the above, and as the apparent result thereof—the following order:

"1. All persons who have instituted legal proceedings against Alejo Port, or against any other person or persons for and concerning tobacco purchased by said Port of the depot quartermaster of Puebla, Captain Charles Webster, of public places, are hereby strictly enjoined from all further proceedings in the premises in any court or courts of this country at their peril.

"2. All persons holding writings, contracts, receipts, bills of sale, or other paper or papers conflicting with or adverse to the latter order issued from these headquarters, nullifying all such contracts, bills of sale, or other paper or papers, or transfers, are hereby ordered forthwith to deliver all such contracts, transfers, bills of sale, or other papers, to Lieutenant Alexander Hayes, quartermaster of this brigade." (Record, pp. 49 and 50.)

These orders show that this claimant and other parties who possibly might have had claims upon him were cited before General Lane, and that he, in effect, enjoined them from taking any further proceedings against any person, or against one another, in relation to this tobacco affair.

LEGAL PROPOSITIONS.

FIRST. *Under the laws of war, the American army had the power and authority to seize Mexican tobacco and sell it as the commanding officer saw fit.*

The whole title of all the parties claiming this tobacco rests upon the laws of war. That title was acquired by force, and the property was disposed of by military order, being a continued exercise of the same law of force. The rules of the common law have no applicability to the case. Port knew that the only title he could acquire was that derived from force, and that he held under the military law,

and his remedies, and those against him, were under the law, and not under the common law. All parties acted upon this principle, and they must abide by it in the pursuit of their remedies.

SECOND. *The officers of the American army had full and perfect authority to make and execute all such laws as those in command saw fit, in such manner as they might determine upon, applicable to such cases as the one in question.*

There is no distinct military code declaring rights and prescribing remedies. But the whole rests upon the ground of physical power in the acquisition of title. The sales of property seized are made by virtue of such orders as the commander may from time to time prescribe, and upon no other regulations. Whoever complains of the exercise of this power must apply to this same military authority for redress. In such cases the military power exercises its own functions and determines in its own way the mode and extent of redress. The parties complaining cannot rightfully avoid demanding a remedy under that law, and afterwards apply to other tribunals and ask for the application of other laws to their cases. These latter tribunals may not have the power to administer full justice to either party, and they may not know, nor have the means of executing the laws under which such military title was acquired. Courts of common law jurisdiction are not adapted to the consideration of such cases. They should be left, as this case was, to the determination of a military tribunal established and empowered to act upon it.

THIRD. *The court convened by order of Gen. Lane had a lawful right to determine in whom the legal title to the tobacco was vested, and that determination was conclusive.*

The civil courts were without jurisdiction or power at Puebla, except such as the conquerors permitted them to exercise. The latter, under the laws of war, had the undoubted right to institute all such tribunals as the conquest rendered convenient. Gen. Lane determined, and no one has the right to reverse that determination, that a military court should convene to determine who owned the tobacco. The parties came before that court, and Port introduced a witness, (Domercq,) who was sworn and testified, and that court adjudicated upon the question, declaring it not to be the property of Port, but that it belonged to Domercq. Without authority to adjudicate upon such questions, nothing could be settled where armies are stationed or proceed in an enemy's country. These tribunals are the only means of insuring justice, and were properly resorted to.

FOURTH. *Port, in submitting to the tribunal established to investigate and determine his claims, became bound to abide its decision, and therefore is concluded from denying that the tobacco did not legally belong to Port, and that, on being refunded the purchase money with interest, he was entitled to no further indemnity.*

After having submitted himself to the court established to hear his claim to the tobacco, and after having become active in asserting his own claim and in trying to defeat that of Domercq, and after having

received back his money in the execution of its decree, Port cannot deny the power of the court, nor dispute the validity of its decree. That tribunal entered upon the duty of doing justice, and we are bound to believe that it succeeded in doing so. That court gave him back his consideration money, with interest. He claimed nothing more. He did not say that he had sold at an advance and was liable to damages, or that he had paid them. It is evident that Abadie's name was introduced as a means of inducing the court to adjudge him (Port) the continued possession of the tobacco. He had ample justice done him. But, whether he had or not, that decision was final. None of the superior officers deemed it unjust, and, therefore, none would reverse it on appeal.

FIFTH. But having purchased with a full knowledge of the fact that the United States did not own the tobacco, but that it belonged to Domercq, he has no claim for failure of title to the same.

Mr. Port cannot complain at the result, when he purchased knowing what the officer selling did not, that the United States had no title. He proves by his own witness (Record, p 27) that he knew of the previous sale, and that he bought with the intention of interposing claims, if it should be taken away, on the government. If he had been honest and fair, he would have spoken to Captain Webster about the title, and what he knew of the sale to Hargous and Domercq, which would undoubtedly have led to inquiry and prevented a sale. Colonel Childs and Captain Webster acted in good faith, but Port did not. If ill consequences follow, which were not provided for by the decision of the court, it naturally results from his own course, and they rightfully fall upon his own shoulders.

SIXTH. That after the proceedings restoring to Port the consideration he had paid for the tobacco, he had no legal claim to any indemnification on account of failure of title.

The consideration paid by Port for the tobacco was restored under the decision of a court. This shielded him from loss. The decision was, that he was entitled to so much and no more. This is *res judicata*, and closes the matter; and as full justice was done to him, he has no grounds of complaint, much less for a recovery against the government.

SEVENTH. After the order nullifying all contracts and proceedings on account of said tobacco, no subsequent recovery could be had against Port by his vendee, or any one else claiming under him.

To guard against all possibility of loss to Port, General Lane called the parties whom it might be supposed could disturb Port by claims, and adjudicated the matter, and, in effect, issued a perpetual injunction against them, forbidding all claims against said Port. This closed all claims; and, if he had then been legally liable, it cancelled such liability, and no one could, at any future period, recover against him. This closes all pretence of claim from the supposed claimants on Port.

EIGHTH. *Whether the acts and determinations of the commanding officers or military tribunals in Mexico were right or wrong, this court has no power or authority to adjudicate upon their correctness.*

It cannot be denied that the Puebla military court acted upon Port's case, and made a final adjudication upon it. If it decided rightly, then full justice has been done him. If it decided otherwise, this court is not clothed with the power of an appellate tribunal so as to correct its errors. It can no more review the doings of this court than that of any other court which may have been established under law.

In *Hudson vs. Guestier*, 4 Cranch, 293, it was held that municipal seizures must be regulated by the municipal law, and no foreign court can question the correctness of what was done while acting within its jurisdiction.

In *Craudson vs. Leonard*, 4 Cranch, 434, it was held, that the sentence of a foreign court of admiralty, condemning a vessel for a breach of blockade, is conclusive of the fact in an action on the policy of insurance.

In *Kemp's lessee vs. Kennedy*, 5 Cranch, 173, it was held, that when an inferior county court in New Jersey having jurisdiction to judge in cases of inquisition of treason, its judgment, although clearly erroneous, was not void, but was conclusive, because it had jurisdiction.

In *Hopkins vs. Lee*, 6 Wheat., 109, it was held, that a judgment or decree of competent jurisdiction is conclusive, wherever the same matter is again brought in controversy, although the rule does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree.

In *Elliot vs. Piersol*, 1 Peters, 328, p. 340, the Supreme Court said: "We agree that if the county court had jurisdiction, its decision would be conclusive." "Where a court has jurisdiction, it has a right to decide every question that occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to reversal in opposition to them."

In *Thompson vs. Tolmie*, 2 Pet., 157, it was held, that when the proceedings of a court of competent jurisdiction are brought before another court collaterally, they are by no means subject to all the exceptions which might be taken to them on a direct appeal. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities of any suit are to be corrected by some direct proceeding, either in the same court to set them aside, or in an appellate court."

In *the United States vs. Nourse*, 9 Pet., 8, it was held: "It is a rule to which no exception is recollected, that the judgment of a court

of competent jurisdiction, while unreversed, concludes the subject-matter as between the same parties. They cannot again bring it into litigation."

In *Voorhees vs. The Bank of the U. S.*, 10 Pet., 449, p. 473, it was held, that "so long as a judgment remains in force it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment; the errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such an examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment." "A judgment or execution irreversible by a superior court cannot be declared a nullity by any authority of law, if it has been rendered by a court of competent jurisdiction of the parties, the subject-matter, with authority to use the process it has issued; it must remain the only test of the respective rights of the parties to it."

In *Strother vs. Lucas*, 12 Pet., 410, it was held, that no principle can be better established by the authority of the Supreme Court than "that the acts of an officer to whom a public duty is assigned by his king, within the sphere of his duty, are *prima facie* to be taken to be within his power." "The principles upon which it rests are believed to be too deeply founded in law and reason ever to be successfully assailed."

In *Wilcox vs. Jackson*, 13 Pet., 498, p. 511, the Supreme Court said: "The acts of Congress have given to the registers and receivers of the land offices the power of deciding upon claims to the right of pre-emption; that upon these questions they act judicially; that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such appellate power, the judgment is conclusive when it only comes collaterally into question so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of a court acting beyond the pale of its authority."

In *Cocke vs. Halsey*, 16 Pet., 71, it was held, that "in every instance where a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until reversed by a superior tribunal; and cannot be affected, nor the rights of persons depending upon it impaired by any collateral proceeding."

In *The Philadelphia & Trenton R. R. Co. vs. Stimson*, 14 Pet., 448, p. 458, the Supreme Court said: "The patent was issued under the great seal of the United States, and is signed by the President and countersigned by the Secretary of State. It is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties, until the contrary is proved. And when, as in the present case, an act is to be done, or patent granted, upon evidence and proofs to be laid before such officer, upon which he is to decide, the fact that he has done the act or granted the patent, is *prima facie* evidence that the proofs have been regularly made, and

were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency."

In *Williams vs. The United States*, 1 How., 290, it was held, that "the acts of the court must, in the first instance, be *presumed* to be regular, and in conformity with settled usage, and are conclusive until reversed by competent authority."

In *Grignon's Lessee vs. Astor*, 2 How., 319, the Supreme Court held in relation to a county court in Michigan, that "it was for the court to decide upon the existence of the facts which gave jurisdiction; and *the exercise of the jurisdiction warrants the presumption that the facts* which were necessary to be proved, were proved."

In *Lessee of Hickey vs. Stewart*, 3 How., 750, the court said that the jurisdiction of a court over the subject matter could alone be inquired into.

In *Simpson vs. Hart*, 1 John. Ch. R., 94, it was held, that the decision of a court of competent jurisdiction was *res judicata*, and was conclusive and binding upon all other courts.

NINTH. *The United States did not warrant the title to the property sold.*

There was no express warranty of title in this case. No person is authorized, under the laws of war, to warrant title to property seized. The government, when it sells, conveys only such title as it has. Port knew what his title was. He took it subject to all the hazards which might exist. The government acts by agents, and it authorizes those agents to act legally and not illegally. Colonel Childs had power to sell government property, and not that of an individual. Captain Webster had the same power, and no more. Both were limited to selling the property of the government.

TENTH. *The United States are not liable for the torts or wrongful acts of its officers not committed by its orders.*

The United States can only act through the instrumentality of agents. When such agents act within their legitimate duties, the government is bound by their lawful acts. If these conform to the directions of the law or their lawful superiors, the United States are bound to protect them from the consequences of such acts. If they act without authority and illegally, the government is in no way responsible, but the agents are personally liable for their own illegal acts. In this case the authority was to sell tobacco belonging to the United States. Their duty and power stopped there. Whatever was done beyond was without authority. If Colonel Childs ordered and Capt. Webster sold the tobacco of any other person, both acted without authority, and their acts were not within their duty, and cannot bind the government. They became, by such sale, personally liable. Whether the government will protect them, is a question between them and the government. The principles upon which the government acts are shown in the opinion of Attorney General Black, in his opinion in Capt. Wilkes's case, dated the 14th of July, 1857, and are as follows:

“ Captain Wilkes, while in command of the exploring expedition, caused one of his men to be punished for disobedience of orders. After his return the man brought an action of trespass against Capt. Wilkes, which, after several trials, was abandoned by the plaintiff.

“ I consider the decision of the Supreme Court and the final termination of the cause, under an opinion given by that tribunal, as establishing fully that the orders disobeyed by the plaintiff were the lawful orders of his superior officer, and that the punishment for such disobedience was inflicted by Capt. Wilkes in the discharge of his proper duty.

“ Capt. Wilkes suffered seriously by this litigation ; for though it was finally determined in his favor, his defence put him to a heavy expense, besides the trouble and vexation of it. He now demands that the government will reimburse those expenses, and you ask whether, in my opinion, his claim is valid.

“ When an officer of the United States is sued for doing what he was required to do by law or by the special orders of the government, he ought to be defended by the government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits which he must carry on at his own expense. For this reason it has been the uniform practice of the federal government, ever since its foundation, to take upon itself the defence of its officers who are sued or prosecuted for executing its laws.

“ The following are some of the cases in which this has been done : See *Mitchell vs. Harmony*, 13 How., 115, 10 U. S. L., 727 ; *Elliott vs. Swartout*, 10 Peters, 137 ; *Curtis vs. Martin*, 30 How., 106 ; *Tracey vs. Swartout*, 10 Peters, 80 ; *Lawrence vs. Allen*, 7 How., 784 ; *Lawrence vs. Coswell*, 13 How., 488 ; *Greely vs. Thompson*, 10 How., 225 ; *Maxwell vs. Ring*, 16 How., 147 ; *The United States vs. Guthrie*, 17 Howard, 284 ; *The United States vs. Booth*, 18 How., 476 ; *Greely vs. Burgess*, 18 How., 413 ; *Stairs vs. Peaslee*, 18 How., 521 ; *Gelston vs. Hoyt*, 3 Wheaton, 247 ; *Fleming vs. Page* 9 How., 403 ; *Kendall, Postmaster General vs. United States*, 12 Pet., 524 ; *Marbury vs. Madison*, 1 Cr., 137.

“ In *Little vs. Barreme*, 2 Cr., 170, although the government did not assume the defence, it assumed the judgment recovered against Captain Little, and paid interest and charges. (6 U. S. L., 63.)

“ In *Little vs. Barreme*, 2 Cr., 170, the government took no part in the defence, but it afterwards assumed the judgment, and paid it with interest and all charges.

“ If an officer sued for doing his duty carries on his own defence without appealing to the government for aid during the pendency of the cause, I think he has a just claim, after it is determined, to be placed in as good a condition as he would have been if the government had taken the defence on itself ; in other words, to be repaid the sum he is out of pocket. Of course he is not to be allowed any unreasonable or extravagant expenses.

“ I see no reason why Capt. Wilkes should not have what he asks.”

If the property sold by Captain Webster was not such as he was

authorized to sell, the sale was void, and conveyed no title, and the government was not responsible.

But the officers of the army then in command in Puebla acted fairly and properly. When it was questioned whether the tobacco was public or private property, a court was appointed, and those interested, including the present claimant, were called upon to show what their rights were. When it was determined that the tobacco was private property, it was ordered to be delivered to the proper owner, and the purchaser (Port) had his purchase money refunded; and subsequently all persons were forbidden to sue him in consequence of any contracts he might have made. Although not liable for the acts claimed to be illegal, still the government, through General Lane, sought to do, and actually did, justice to all parties.

ELEVENTH *The claimant has not shown that he sustained any damages by occasion of his purchase.*

Mr. Port paid \$12,000 for the tobacco in question, and that was refunded to him with interest; so that he has lost nothing.

It is true, he alleges that he had sold the tobacco at an advance, and had to pay his vendee the amount of that advance; but this fact is not proved.

The tobacco was found *in his possession* when it was taken and delivered to Domercq. It had not been *out of his possession* after his purchase. He makes no proof of sale to Abadie, nor of having paid him, or any one else, anything by way of damages.

But if he had made proof of these facts, it would not authorize him to recover of the United States what he might have sustained by his dealings with others after his purchase. He should have proved these facts before the court at Puebla; but he did not. He received his consideration money back, and under the military orders then in force in Puebla no one could recover against him on account of the tobacco in question. General Lane had ordered Abadie, and all those who are claimed to have been subsequent purchasers, to come before him on the subject of this tobacco. It is not to be presumed that they came, as he afterwards made an express order forbidding further legal proceedings against Port. General Lane had the right to make this order, and it was binding upon all parties, and no one could proceed further against Port; and there is no proof that any one ever did so. The matter was adjudged and ended, and must forever remain so.

Mr. Port has not sustained any loss by reason of his having sold the tobacco, and can never do so; and therefore this ground of complaint fails him.

He did not even pretend before the court that he had lost anything by selling to Abadie. But he simply set up, by way of protecting the tobacco from the claim of Domercq, that he had sold it to another.

If he had really sold the tobacco before he was forbidden to do so, and had really sustained damages, or was liable to sustain them, it was his duty to have shown that fact by proper evidence before the court which heard his case, and in that event, if right and proper,

and he had not been in fault about the matter, they could, and doubtless would, have awarded him full indemnity. But he made no such claim, and offered no such proof, and he is therefore bound to be content with what was awarded to and received by him. He cannot complain that the court did not award him a measure of damages which he did not claim or prove.

R. H. GILLET, *Solicitor*.

FEBRUARY 25, 1859.

J. ALEXIS PORT *vs.* THE UNITED STATES.

The opinion of the Court was delivered by Chief Justice GILCHRIST.

The facts in this case, as they are stated in the petition, are, that, on the 12th day of September, 1847, Colonel Childs, the officer commanding at Puebla, ordered Captain Webster to "sell at auction some captured tobacco, and dispose of the proceeds as he will be hereafter directed." In obedience to this order Captain Webster advertised, on the 16th of October for sale, at auction, on the 19th of October, five hundred bales of tobacco. On the 21st day of October the claimant purchased the tobacco for the price of twenty-five dollars per bale, amounting to the sum of twelve thousand dollars, for which he paid \$8,000 in cash, and gave the United States credit for \$4,000, they being then indebted to him for supplies furnished the army.

The first question that arises is, what are the rights and liabilities of the claimant of the United States after the sale of the tobacco and the payment of the price by the claimant.

In this case there were all the elements necessary to constitute a contract. The United States and Mexico were at war. The American army was in actual possession of a considerable portion of Mexico, and, by the law of nations, had a right to seize the property of the Mexican government as lawful prize. Colonel Childs had, for the time being, supreme civil and military authority in the military department of Puebla, and in his then existing capacity he represented the United States, whose officer and servant he was. His authority, as the head of the army, could not be resisted; for this was especially a case where, from necessity, the laws must be silent in the presence of a victorious army.

The principles regulating the rights of nations at war, when an army is in possession of an enemy's country, are clearly established by the writers on the law of nations. "When the sovereign or ruler of a State declares war against another sovereign, it is understood that the whole nation declares war against another nation." * * "Hence, these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other."—Vattel, B. 3, ch. 5, § 70. "Everything, therefore, which belongs to that nation, to the State, to the sovereign, to the subjects, of whatever age or sex—everything of that kind, I say, falls under the description of things belonging to the enemy."—Ibid., § 73. "We have a right to deprive our enemy of his possessions, of everything which may augment his

strength, and enable him to make war.”—Ibid., B. 3, ch. 9, § 161. “As towns and lands taken from the enemy are called *conquests*, all movable property taken from him comes under the denomination of *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquests, for he alone has such claims against the hostile nation as warrant him to seize on their property and convert it to his own use.”—Ibid., § 164. “The property of movable effects is vested in the enemy from the moment they come into his power.”—Ibid., B. 3, ch. 13, § 196. As to movables captured in a land war, it has been sometimes stated to be merely requisite that the property shall have been twenty-four hours in the enemy’s hands; but other writers hold that the property must have been brought *infra præsidia*—that is, within the camps, towns, ports, or fleets of the enemy; and others have drawn lines of an arbitrary nature.—Marten’s Law of Nations, 290, 291; 2 Wooddes, Vin. L., 444, § 34. But in respect to maritime captures, a more absolute and certain species of possession has been required, in order to obviate the right of postliminium, such as a sentence of condemnation, to give a neutral purchaser a title to a prize vessel.—Case of the Flad Oyen, 1 Rob., 134; 8 T. R., 270. “Immovable possessions, lands, towns, provinces, &c., become the property of the enemy who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the State to which those towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect.”—Vattel, B. 3, ch. 13, § 197. The conqueror who takes a town or province from his enemy cannot justly acquire over it any other rights than such as belonged to the sovereign against whom he has taken up arms. War authorizes him to possess himself of what belongs to his enemy; if he deprives him of the sovereignty of that town or province, he acquires it, such as it is, with all its limitations and modifications.—Ibid., § 199.

In a condition resulting from a state of war, if property be seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authorities; but no action can be maintained against the party who has taken it in a court of law. In England no municipal court, whether of common law or of equity, can take cognizance of any questions arising out of hostile seizure.—Le Caux *vs.* Eden, 2 Dougl., 573. So if booty be taken under the color of military authority, by an officer under the supposition that it is the property of a hostile State or of individuals which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by his Majesty, and by his Majesty ultimately, assisted by the Lords in Council. There are no direct decisions on such questions, because, as was stated by Lord Mansfield in *Lindo vs. Rodney*, Dougl., 313, they are cases of rare occurrence.—Le Caux *vs.* Eden, Dougl., 592.

It is to be remembered that we are now examining this case upon the supposition that the allegations in the petition are true, and the general question is, whether, supposing them to be true, a proper case is presented for the taking of testimony. The United States were in

possession of a quantity of tobacco captured from the enemy during the war with Mexico. Under this general question the first inquiry is, whether, when a person sells personal property in his possession, there is an implied warranty that he has a title to such property.

In most of, if not all, the cases in this country, wherever the question has been raised, it has been held that in every sale of personal property there is an implied warranty of title. Some of the decisions to this effect are, *Defreeze vs. Trumper*, 1 Johns., 274; *Bayard vs. Malcolm*, ibed., 469; *Rew vs. Barber*, 3 Cowen, 280; *Case vs. Hall*, 24 Wend., 102. In *Vibbard vs. Johnson*, 19 Johns., 78, it is said: "There is no doubt that in every sale of a chattel for a sound price, there is a tacit and implied warranty that the vendor is the owner, and has a right to sell." In *Coolidge vs. Brigham*, 1 Metc., 551, the court said: "In contracts of sale warranty is implied. The vendor is always understood to affirm that the property is his own. This implied affirmation renders him responsible if the title is defective." In *Boyd vs. Bopst*, 2 Dale, 91, it was said by the court: "The possession of chattels is a strong inducement to believe that the possessor is the owner, and the act of selling them is such an affirmation of property that on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller." There are numerous other cases to the same effect, which need not be particularly adverted to for the present purpose. The same doctrine is stated in *Story on Contracts*, § 535, where numerous English cases are cited by the author in support of his position.

In the 1 Law Reporter United States, 272, there is a careful and discriminating analysis of the decisions upon this point by Mr. Pike, of Arkansas, in which the writer comes to the conclusion that the law of England on this subject is like the civil law, and that there is an implied warranty, not of title, but of undisturbed possession and enjoyment. It is immaterial, in the present case, what is the precise character of the implied warranty, whether it be one of title, or of peaceable possession only, because the United States were not only in possession and sold the property, but it has been taken from the possession of the purchaser, who is seeking to recover damages for the breach.

In judicial sales, where property is sold by the marshal under an order of court, it is held that no warranty is implied. (*The Monte Allegre*, 9 Wheat., 644.) But this was not a judicial sale. It was simply a sale by the United States, acting through their officers in an enemy's country, of property in their possession, to which they claimed a title by the rights of war; and we see no reason why they should stand in any better position, in regard to property in their possession, than a private citizen. The sale was in obedience to an order from the commanding general to his military subordinate. We cannot regard the general as a court of law, or Captain Webster as an officer of a court; for this would tend to confound all the distinctions that exist between a state of peace and a state of war in regard to the rights of property.

If, then, there be nothing in the other facts in the case to alter or

modify the conclusion, the claimant must be held to have established a right of action against the United States.

But the counsel for the claimant puts his case upon still another ground. He contends that the tobacco belonged to the United States by the rights of war and of conquest; that they sold it to him, and then took it away from him, making him thereby liable in damages to his vendors.

That, upon the facts stated in the petition, we must consider the tobacco as property captured in war by the army of the United States, we think there is no doubt. It was taken by an authority which, for the time being, was supreme. Mexico, so far as it was actually occupied by a competent military force, was, for the time, a conquered country. In the rights of conquest all ordinary civil jurisdiction and remedies were merged. In all that the commanding officer did, so far as he was justified by the law of nations, he represented the country by whose authority he was in command of a military force. It was by this authority, under the law of nations, that the tobacco must for the present be considered to have been captured, and also that it was the property of the enemy. When captured, it was not the private property of the captor, but it became the property of the sovereign, according to Vattel—in this country, of the United States. The people, acting through the only agents who could, from the necessity of the case, be recognized—that is, the officers in command—sold to the claimant, who paid the consideration for it. It then became *his* property, and, after such a sale and payment, the United States had no greater right to take the property into their possession, without indemnifying those who might have a claim to it, than any individual would have to take property from his vendee, on the ground that he had no right to sell it.

It appears from the petition, that, after the sale of the tobacco, the petitioner was informed that it was claimed by a merchant of Puebla, by the name of Domercq, and that a board of inquiry was convened by order of General Lane, consisting of four officers of the army, for the purpose of examining into the matter, a majority of whom reported that the tobacco was not, at the time of the sale, the property of the United States, and they awarded the possession and ownership thereof to Domercq, and that the consideration paid by the claimant should be returned to him, which was accordingly done. Subsequently, upon its being reported to General Lane that the last buyer of the tobacco refused to give up the key of the store-house, an officer and a file of men forcibly seized and delivered the tobacco to Domercq.

This must be considered as the act of the United States. It stands on the same ground with the sale of the tobacco. The United States, through their officers, were in the actual possession of the supreme civil and military authority. With such a responsibility upon him, the commanding officer must, *ex necessitate*, act with promptness and decision. In a state of war, where the ordinary tribunals are silent, a nation must expect to incur the risk of pecuniary liability for the acts of its officers in a foreign country, whose course of conduct must be determined by what seems best under existing circumstances. It would be unreasonable in the extreme to require of military officers,

carrying on war abroad, placed in difficult and trying positions, either the experience or the legal skill that would enable them to appreciate the subtle distinctions which, at home, and in a time of peace, are applied to the ascertainment of legal rights. It is a necessary consequence of a state of war that the orders of the general can admit neither of argument nor resistance. It is the *nation* that carries on the war, and not the individual officer; and it follows that the nation must be liable for the acts of such agents as it sees fit to employ in the prosecution of its object.

Our conclusion is, that if the allegations in the petition are proved, the claimant is entitled to some damages from the United States. Whether the claimant is entitled to recover any sum beyond the consideration paid by him by reason of his liability to subsequent vendees, is a question which can more conveniently be examined when all the evidence relating to damages is laid before us. At present, we shall merely order testimony to be taken.

IN THE COURT OF CLAIMS.—MAY 31, 1859.

J. ALEXIS PORT, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

This is a claim for \$18,000 in damages, and interest.

The following are the facts:

During the war between the United States and Mexico, when General Worth and his forces, in May, 1847, took possession of the city of Puebla, he captured there a large quantity of tobacco belonging to the Mexican government. He confiscated this tobacco, and ordered it to be sold. On the 25th of May, 1847, the chief quartermaster, Captain Allen, by order of General Worth, sold 2,081 bales of this captured tobacco to L. S. Hargous; and early in June, 1847, Mr. Hargous sold the same 2,081 bales of tobacco to Don Juan Domercq, a Spanish citizen, resident in the city of Mexico. These sales were made in the city of Puebla, were *bona fide*, and for valuable considerations. At the time of the sale of the tobacco by Hargous to Domercq, 1,325 bales of it were deposited in the quartel (public barracks) of San Jose, in Puebla, and the remainder in other parts of the city. Some time after General Worth and his army had left Puebla for the city of Mexico, Colonel Thomas Childs, the civil and military governor of Puebla, being informed that said tobacco in said quartel belonged to the United States, and supposing it to be so, directed the quartermaster to sell the same. Accordingly, Captain Webster, assistant quartermaster, advertised 500 bales of said tobacco to be sold at the quartel San Jose on the 19th of October, 1847, at public auction. On that day Mr. Port purchased the 500 bales of tobacco from Captain Webster, at \$24 a bale, amounting to \$12,000, which was paid as follows: \$8,000 in cash, and \$4,000 by a credit to the United States in an account for clothing supplied by Port. The tobacco was accordingly delivered to Port. After said sale had been advertised a friend of Domercq called on Colonel Childs and exhibited bills of

sale, which satisfied him that the tobacco was not government property. The colonel immediately sent orders to Captain Webster to stop the sale ; but the sale to Port had then been made. Captain Webster, however, wrote to Port on the 30th of October, 1847, as follows:

“SIR : You will please suspend the sale of tobacco purchased of me for the present. You are, perhaps, aware that the whole is claimed by Señor Domercq.

To this letter Mr. Port answered, on the next day, that, on the 27th instant, he had sold to Mr. John Abadie, of Puebla, the said 500 bales of tobacco. General Lane, in order to ascertain the facts of this case, ordered on the 17th of November, 1847, at Puebla, a board of inquiry to inquire into the matter. The board was accordingly organized, and after hearing the statements of Domercq and Port, and examining fully Colonel Childs and Captain Webster, and also (at Port's request) Mr. Domercq, as witnesses, decided as follows :

“The board, finding no material contradiction in the statements of the different witnesses, deem it unnecessary any further to specify the facts proven than to decide that the testimony supports the substantial allegations of Domercq's petition. They are of opinion that the 500 bales of tobacco sold by Captain Webster to Mr. Port were, at the time of the sale, the property of Mr. Domercq, and not the property of the United States, and award the possession and ownership thereof to him, the said Domercq ; and that the quartermaster, Captain Webster, pay to Mr. Port \$8,000, with interest from the date of its payment to (by) him, and cancel the credit of \$4,000 to the United States in its accounts with Port for clothing, &c., supplied. As to the repayment of the purchase money to Port, Major Young dissents on the following grounds, viz : Port sold the said tobacco to persons not parties to these proceedings, and who may have paid him, the said Port, for the same ; that the quartermaster retain the purchase money until the question as to whom the money shall be paid shall be decided by some competent authority.”

Mr. Port appealed from this decision of the board to Major General Scott, and then to General Butler, both of whom refused to interfere with the decision. The French minister at Washington, early in 1849, presented Mr. Port's claim to the Secretary of State. The necessary information for the Secretary was obtained, namely, reports of Colonel Childs, Captain Webster, and the aforesaid board of inquiry. The Secretary of State, the petition informs us, rejected the claim. The claim was afterwards, in April, 1850, presented to Congress, and, on the 3d of March, 1851, the Committee of Foreign Relations of the House of Representatives reported against the claim.

The claimant contends that by his purchase he obtained a legal title to the tobacco. He says that the taking of the tobacco by Colonel Childs vested the property in the United States, and that, of course, their sale of it to him was valid. The answer to this argument is, that it assumes that Colonel Childs seized the tobacco as enemy's property, and confiscated it accordingly, whereas the fact is entirely otherwise. The tobacco had been captured by General Worth in May, 1847, and

sold directly afterwards, by his order, to Hargous, who sold it in June following to Domercq. Colonel Childs, not knowing of the sale under General Worth's order, and being informed and believing the tobacco to belong to the United States, ordered it to be sold as United States property. But the moment that Colonel Childs discovered that it did not belong to the United States, but that it was the private property of Domercq, he ordered the sale to be stopped. The order, however, came too late. The case stands exactly on the ground of the sale by one individual to another of goods belonging to a third party. Such a sale is absolutely void; and the real owner, notwithstanding the sale, may take the goods wherever he may find them, so that he do not commit a breach of the peace; or he may recover their value from the person in possession, who refuses to deliver them.

In the present case the real owner of the tobacco, Domercq, got possession of his property, and the purchaser, Port, received back his purchase money and interest. The evidence shows that the conduct of Colonel Childs and Captain Webster was perfectly fair in regard to the sale. But the claimant, to enhance the damages, alleges that on the 27th of October, 1847, he sold said tobacco to Mr. Abadie for \$16,500; that Abadie sold it on the 13th of November following to Gormio & Co., for \$17,500; and that Gordon & Murray purchased it on the 15th of the same month for \$21,000, in cash. The allegations in the petition respecting those subsequent sale are not proved; but, if they were, the result would be the same. Neither Colonel Childs nor Captain Webster was authorized by the United States to sell the tobacco in question, which was the property of Domercq, and the purchaser, therefore, could claim nothing from the United States on account of the failure of title beyond the amount of the purchase money received by them, with interest from the time it was received. It is proper, however, here to observe that on the trial before said board, Port put the following question to Domercq as a witness: "Did I not, on several occasions, inform you that I intended to buy the tobacco?" The answer was as follows: "The first time I ever heard anything on the subject was one day when Port called, in my hearing, to the son of the Spanish consul, and asked him if he did not wish to join him in the purchase of the tobacco; the reply to which was: "No, for it is the property of a friend, and you will make yourself liable to reclamations." Some day or two after, Port told witness he had purchased 500 bales of the tobacco, and asked him if he did not wish to join him in the purchase; to which he replied in the negative, for he did not wish to purchase his own property. Port answered that that made no difference; that he could always interpose his claims." This evidence shows that Port was informed before he purchased, that the tobacco belonged to a third person, and also that, before the time when he alleges he sold to Abadie, he was informed that the tobacco was Domercq's.

It appears to us to be clear that, under the circumstances of this case, as the purchase money has been returned to the claimant, with interest, he has received all he was entitled to on account of the want of title to the tobacco, of which he complains.

But, independently of said claim, the petition claims damages for

an alleged trespass in the forcible seizure, by order of the commanding general, of said tobacco and the delivery of it to Domercq. It is only necessary, in answer to this claim, to say that if the act complained of was justifiable, either by the laws of nations or any other law applicable to the case, there is, of course, no ground for complaint. If, on the contrary, the act was in violation of the laws governing such cases, the government is not legally responsible for the trespass, for the plain reason that no officer, civil or military, has authority from the government to commit unlawful acts of trespass.

It is the opinion of the court that the claimant is not entitled to recover.

GEORGE N. BUTT, SURVIVOR OF BUTT & BLACK.

FEBRUARY 11, 1860.—Reported from the Court of Claims, committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

GEORGE N. BUTT, SURVIVOR OF BUTT & BLACK, *vs.* THE UNITED STATES.

1. The petition of the claimant.
- 2 Original documentary evidence in the case transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said court, at Washington, this fifth day of December,
A. D. 1859.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

Petition.

GEORGE N. BUTT, surviving partner of Black & Butt, *vs.* THE UNITED STATES.

To the honorable the judges of the Court of Claims:

Your petitioner, George N. Butt, surviving partner of the late firm of Black & Butt, a resident of Grayson county, State of Texas, respectfully represents: That on the seventh day of June, A. D. eighteen hundred and fifty-one, the said firm entered into a contract with Captain Alexander Montgomery, assistant quartermaster of the United

States army, to transport from Preston, Texas, to the post about to be established on the Brazos river, Texas, (assumed distance 158 miles,) such army stores and army baggage as the assistant quartermaster at Preston might require them to transport to said post on the Brazos; that they would deliver the said stores and baggage to the assistant quartermaster at the aforesaid post on the Brazos in the like order and condition as when received from the said assistant quartermaster at Preston, without unavoidable delay, unavoidable losses and damages only excepted; that they would provide good well-covered wagons and serviceable teams, with competent drivers, for this service, and that they would transport said stores as above stated whenever so required to do except between the first days of December and the fifteenth day of March in each year that the said contract should remain in force; and the said Captain Montgomery, on behalf of the United States, promised and agreed to pay to your petitioners three dollars for each and every hundred weight of army stores and army baggage which they should transport as above stated, and pro rata for the transportation of said stores and baggage to any point or points west of the Brazos river; and the said Captain Montgomery, assistant quartermaster, promised and agreed to cause sufficient military protection to be afforded to the teams employed as aforesaid, provided said teams were to be made to move in such order as the officers in command of escorts should direct, and that the said contract should remain in force for one year from the date thereof, or longer, as might be determined by the said Captain Montgomery, assistant quartermaster, or his successors. Your petitioners would further show that for the faithful performance of their contract they entered into a bond with approved securities in the penal sum of fifty-two thousand dollars, and that to enable petitioners to comply promptly with the terms of their said contract they purchased and employed a large train of wagons and teams, to wit: sixty-eight large road wagons, drawn by about two hundred and seventy-two yoke of oxen, and hired the necessary number of teamsters and laborers to attend to and manage the same, and that your petitioners faithfully transported all the military stores and baggage, and performed all the services required of them by their contract during the year 1851. Petitioners further represent that never doubting the continuance of their said contract for the full period of at least one year, they were at considerable trouble and expense in the care of such teams and wagons as they had purchased and kept on hand through the winter, to enable them to resume promptly on the 15th day of March, 1852, the execution of their said contract, and that on the said 15th of March, 1852, or thereabouts, they reported themselves to Captain G. F. Wood, assistant quartermaster of the United States army, at Preston, the successor of said Captain Montgomery, as ready to resume the transportation required of them by their contract, when your petitioners were verbally informed that their contract was at an end, and abrogated by the United States, without alleged fault on the part of your petitioners, and to their great damage.

Your petitioner further represents that about the time of the abrogation of their said contract by the United States, another contract was entered into by the government of the United States with one T. G. Wright, of Red River county, Texas, for the transportation of army stores, &c., from Wright's Landing, on Red river, to Preston, instead of employing the teams of your petitioners in this service, to their very great loss and injury.

They allege that they had faithfully and promptly performed all the service required of them by their contract during the hauling season of 1851, and they allege that in consequence of the sudden and unexpected abrogation of their contract, which they had been led to believe would last not only the one year, but for several years, they have sustained great loss and damage. They further represent that they have only received from the United States on account of said contract the gross amount of \$28,950, which would not have sufficed even to feed the number of oxen employed in the service through the winter. The premises considered, petitioners pray your honors to grant such relief as may seem equitable and just.

And your petitioner, G. N. Butt, for himself and as the surviving partner, represents that they are the sole owners of said claim, and that they have never assigned or transferred it to any one else. They also represent that they petitioned Congress for relief in January, 1854; that their petition and accompanying documents and proofs were referred by the House of Representatives to the Committee on Claims, and that no action appears to have been had thereon; and the said House of Representatives have referred the same to the Court of Claims.

GEORGE N. BUTT.

JOHN A. ROCKWELL,

Counsel for petitioner.

PETITION TO CONGRESS.

To the Senate and House of Representatives of the Congress of the United States:

The memorial of Black & Butt, residents of the State of Texas, in the county of Grayson, respectfully represents: That on the 7th day of June, A. D. 1851, they entered into a contract with Captain Alexander Montgomery, assistant quartermaster United States army, for the transportation of army stores, baggage, &c., from Preston, in Texas, to the military post then about to be established on the Brazos river, now called Belknap, (duplicate copy of which is hereto attached, marked "Exhibit A,") and that for the faithful performance of said contract they gave their bond in the penal sum of \$52,000, (see exhibit B.) They represent that in order to comply with their contract they were put to an enormous expense in the purchase of large trains of wagons and teams, to wit: sixty-eight large road wagons and two hundred and seventy-two yokes of oxen; that the wagons and teams

cost on an average three hundred and fifty dollars. They further represent that by their contract they were entitled to retain their contract for at least one year, and were under heavy bonds to keep themselves ready to recommence hauling on the 15th March, 1852, having already performed the service required of them in the year 1851; that the keeping of so many oxen through the winter, in order to have them strong enough to do the service in the spring, involves a heavy expense; that in March, A. D. 1852, they were ready, and so reported themselves to Captain Geo. W. F. Wood, assistant quartermaster United States army, to resume the transportation of army stores, baggage, &c., and were soon after informed that their contract was at an end. This was done verbally, but they are not still relieved from their bond. They further represent, at this time, to wit, the spring of 1852, a contract was entered into between the government of the United States and Travis Wright, of Red River county, Texas, for the transportation of army stores, &c., from Wright's Landing, on Red river, to Preston, instead of employing the discharged teams of your memorialists in this service, thereby doing great injustice to your memorialists, who had faithfully and promptly performed all the duties required of them during the hauling season of 1851. (See exhibits C and D.)

They therefore say that by reason of the unexpected abrogation of their contract, which they were led to believe would not only last one year, but several years, they have suffered great damage, not less than \$15,000, and they ask as a matter of justice that they may be remunerated. (See two affidavits in exhibit E as to these damages.)

BLACK & BUTT,

By their attorney, Richard Burgess.

WASHINGTON, D. C., *January 17, 1854.*

Agreement between Captain Montgomery and Black & Butt.

This agreement, made the seventh day of June, eighteen hundred and fifty-one, between Captain Alexander Montgomery, assistant quartermaster United States army, in behalf of the United States, on the one part, and Messrs. Black & Butt, of Preston, Texas, on the other part, witnesseth: That the said Messrs. Black & Butt, for the consideration hereinafter named, do hereby promise and agree to transport from Preston, Texas, to the post about to be established on the Brazos river, Texas, (assumed distance one hundred and fifty-eight miles,) such army stores and army baggage as the assistant quartermaster at Preston may require them to transport to said post on the Brazos; that they will deliver the said stores and baggage to the assistant quartermaster at the aforesaid post on the Brazos in like order and condition as when received from the aforesaid assistant quartermaster at Preston, without unreasonable delay, unavoidable losses and damages only excepted; that they will provide good, well-covered wagons and serviceable teams, with competent drivers, for this service; and that they will transport the said stores as above stated

whenever so required to do, except between the first of December and the fifteenth of March in each year, during which this contract shall remain in force.

And the said Captain Alexander Montgomery, assistant quartermaster, on behalf of the United States, promises and agrees to pay to the said Messrs. Black & Butt three dollars for each and every hundred weight of said army stores and army baggage which they shall transport as above stated, and pro rata for the transportation of said stores and baggage to any point or points west of the Brazos river.

And the said Captain Alexander Montgomery, assistant quartermaster, hereby promises and agrees to cause sufficient military protection to be afforded to the teams employed as above stated, provided the said teams shall be made to move in such order as the officers in command of escorts shall direct.

This contract to remain in force one year from date, or longer, as may be determined by the said Captain Alexander Montgomery, assistant quartermaster, or by his successor.

The payments under this contract to be made quarter-yearly, or as soon after the expiration of each quarter as it may be possible for the said Captain Alexander Montgomery, assistant quartermaster, or his successor, to procure funds wherewith to make the payments.

In witness whereof, the parties hereunto have set their hands and seals.

Done in triplicate at Fort Smith, Arkansas, the day and year first above written.

A. MONTGOMERY,
Captain and A. Q. M.
BLACK & BUTT.
WM. H. HUNT.
J. D. FITZGERALD.

Witness:
J. R. KANNADY.
W. H. AILES.

STATE OF TEXAS, *Fannin County*:

Before me, Samuel A. Roberts, a notary public in and for the State and county aforesaid, personally appeared John D. Black and George N. Butt, to me well known, who severally acknowledged that they signed the above and foregoing article of contract by the name of Black & Butt, for the purposes and consideration therein expressed.

[L. s.] To certify which I have granted this certificate under my hand and seal notarial this 17th day of June, A. D. 1851.

SAM'L A. ROBERTS,
Notary Public.

EXHIBIT B.

Bond to secure performance of agreement.

Know all men by these presents that we, Black & Butt, William H. Hunt, and J. D. Fitzgerald, are held and firmly bound to the United States of America in the amount of fifty-two thousand dollars, lawful money of the United States, for which payment to be well and truly made we bind ourselves and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of June, 1851.

The condition of this obligation is such that if the above bound Black & Butt, their heirs, executors, or administrators, or any of them, shall and do in all things faithfully perform all the stipulations of a contract for the transportation of army stores and army baggage from Preston, Texas, to the Brazos river, Texas, bearing date the 7th day of June, 1851, which the said John D. Black and George M. Butt have agreed to perform according to the true intent and receiving thereof, then this obligation to be void, otherwise to remain in full force and virtue.

BLACK & BUTT.

W. H. HUNT.

J. D. FITZGERALD.

STATE OF TEXAS, *County of Fannin:*

Before me, Samuel A. Roberts, a notary public in and for the State and county aforesaid, personally appeared John D. Black and George N. Butt, William H. Hunt, and J. D. Fitzgerald, to me well known, who severally acknowledged that they signed the within bond for the true intent and purposes therein expressed.

To certify which I have granted this my certificate under my hand and seal this 17th day of June, A. D. 1851.

SAMUEL A. ROBERTS,

Notary Public.

I certify that the within is a correct copy.

A. MONTGOMERY,

Captain, Assistant Quartermaster United States Army.

EXHIBIT D.

Certificate of Captain Lynde.

This is to certify that Messrs. Black & Butt, that is, John D. Black and George N. Butt, transported three hundred and fifty-five thousand five hundred and sixty-six pounds of public stores from Preston, Texas, to Fort Belknap, Texas, by virtue of a contract between Captain Alexander Montgomery, assistant quartermaster, on

the part of the United States, dated at Fort Smith the seventh (7th) day of June, eighteen hundred and fifty-one, (1851,) and that on the twelfth (12th) day of July the said Black & Butt started their first train, which was as soon as required, and continued on until the thirtieth (30th) of September of the said year, (1851,) at which time I was relieved by Major G. W. F. Wood of the duties of the depot at this place.

I further certify that the said Black & Butt used due diligence, and that they transported or forwarded all such goods as given them promptly.

J. LYNDE,
Captain Fifth Infantry.

PRESTON, TEXAS, *December 15, 1852.*

EXHIBIT C.

Certificate of Major Wood.

I certify that whilst on duty at Preston, Texas, and in charge of the depot at that place, that Black & Butt, (that is to say, G. N. Butt and J. D. Black,) transported and delivered at the post of Camp Belknap the following number of pounds of public property and stores, viz: forty-seven thousand seven hundred and twelve pounds of freight in good order and condition, in obedience to a contract made by Captain A. Montgomery, assistant quartermaster United States army, and the said Black & Butt. And that in the spring of 1852 the said Black & Butt, in good faith, supposing said contract to be in full force, stated they were in readiness to transport any supplies for the said post that the quartermaster might deliver to them, but that I was authorized and otherwise instructed, and ordered to transport the supplies for the post above mentioned by government teams; and that, in consequence of said order, the said Black & Butt have asked of me this certificate, in order to show the department the injury they have sustained by not being permitted to transport the stores, as they considered the contract required they should; and that they were in readiness to comply with the contract at the time of the arrival of the stores at Preston in the spring of 1852. So stated by them.

GEO. W. F. WOOD,
Assistant Quartermaster.

AUSTIN, TEXAS, *January 24, 1853.*

EXHIBIT E.

Affidavit of Joseph Blackwell.

STATE OF TEXAS, *Fannin County:*

Before me, Samuel A. Roberts, a notary public in and for the county and State aforesaid, authorized by law to administer oaths for general purposes, personally appeared Joseph Blackwell, to me well known

as a man worthy of belief, who, being solemnly sworn, made and subscribed the following affidavit, viz :

During the summer and early part of the autumn of 1851 I was in the employ of Messrs. Black & Butt, who were engaged in the transportation of army stores and baggage from Preston, in Texas, to Fort Belknap, on the Brazos ; that he acted in the capacity of wagon-master ; that Black & Butt had to purchase a large number of wagons and teams, at short notice, and at a time of the year (the spring) when oxen are always considerably higher in Texas than they are in the fall. During the time affiant was in the employ and acting as wagon-master, to wit: from the commencement of the hauling season in 1851, say about the 1st of June, to the time the contract was taken from Messrs. Black & Butt, which affiant thinks was early in the fall of 1851, the train of wagons and teams engaged in said transportation consisted of from sixty to seventy wagons.

Affiant further saith, that, in his opinion, considering the high prices paid for their teams in the spring, and their heavy losses on them when sold in the fall, and the many other incidental expenses incurred by Messrs. Black & Butt to prepare for the completion of their heavy contract, the said Black & Butt suffered damages to the amount of \$15,000 by the taking of the contract from them.

JOSEPH BLACKWELL.

Witness : R. C. STEWARD.

[L. s.] To certify which I have hereunto set my hand and seal of office this 27th day of October, A. D. 1853.

SAMUEL A. ROBERTS,
Notary Public of Fannin County.

STATE OF TEXAS, *Fannin County* :

Before me, Samuel A. Roberts, a notary public in and for said county, personally appeared Sampson W. Fitzgerald, to me well known as a witness worthy of full belief, who, being solemnly sworn, saith :

That he has read the deposition of Joseph Blackwell written on this sheet ; that affiant was employed by Messrs. Black & Butt at the same time as said Blackwell, as wagon-master ; that all the facts set forth in Blackwell's affidavit are, as affiant verily believes, true, and that the damage sustained by said Black & Butt, as estimated by said Blackwell, is in the opinion of the witness rather under than over the real and actual damage suffered by them.

S. W. FITZGERALD.

Witness : RICHARD S. HUNT.

[L. s.] To certify which I have hereunto set my hand and seal of office this 10th day of November, 1853.

SAMUEL A. ROBERTS,
Notary Public.

Statement of loss.

PRESTON, *Grayson County, Texas.*

This is to show the account current of the getting up of a train of seventy wagons and teams, and the expenses or costs of foraging said teams, and pay of teamsters thereunto attached, &c.

To do the transportation of the United States government supplies for the fifth *infantry* of United States troops from Preston, Texas, to Camp or Fort Belknap, Brazos river, Texas, to carry out a contract made in good faith, in June, 1851, with Captain A. Montgomery, assistant quartermaster, at Fort Smith, Arkansas, and by the order and consent of General Arbuckle, they as agents on the part of the United States, and Black & Butt, contractors.

United States to Black & Butt, Dr.

1851, to 10 Bois d'Arc wagons and teams, (80 oxen).....	\$4,000 00
To 60 wagons and teams, \$325, (480 oxen).....	19,500 00
December 15, to first of April, 1852, to 12,320 bushels corn for teams, at 90 cents.....	11,088 00
To 300 tons hay, at \$4 per ton.....	1,200 00
Hire of 70 teamsters from 1st July to December 15, at \$20 per month.....	7,700 00
Rations per teamster, for 70 teamsters, 5½ months, at \$5 per man per month.....	1,900 00
Lost, died, and strayed, (42 oxen,) no charges.....	
	45,413 00
Credit by cash received	28,950 00
Due us by the United States this amount.....	16,463 00

BLACK & BUTT, *Contractors.*

STATE OF TEXAS, *Fannin County:*

Before me, Samuel A. Roberts, a notary public in and for the county and State aforesaid, personally appeared George N. Butt, one of the firm of Black & Butt, and well known to me, who, being sworn, said that the items charged in the within account are set down at their fair cash value, and, as far as can now be ascertained, at cost; and that the credits on accompanying sheet, marked "Exhibit A," cover all the money received by Black & Butt for the several items specified in said account.

G. N. BUTT.

Sworn to and subscribed this 9th day of March, A. D. 1854. Wit-
[L. s.] ness my hand and official seal.

SAMUEL A. ROBERTS,
Notary Public, Fannin County.

*Affidavit of S. W. Fitzgerald and Joseph Blackwell.*STATE OF TEXAS, *Fannin County*:

Before the undersigned notary public, within and for the county and State aforesaid, authorized by law to administer oaths for general purposes, personally appeared Sampson W. Fitzgerald and Joseph Blackwell, who, being sworn, say that they were both engaged as wagon-masters for Black & Butt during the hauling season of 1852; that they are both practical wagoners, and have bought and sold both wagons and teams for the last six or eight years in this portion of Texas, and are well acquainted with the value of such property; and that the prices charged for wagons and teams by Black & Butt, in the within act, are as low as they could be bought at; and that they are credited at fully as much as they were worth. They also state the price charged for corn for fodder of oxen, and the quantity required for that purpose, are both as low as it could be done for, as is also hire of teamsters.

S. W. FITZGERALD.

his
JOSEPH + BLACKWELL.
mark.

Sworn to and subscribed before me this 8th day of April, 1854.

[L. S.]

SAMUEL A. ROBERTS,
Notary Public.

Statement of Black & Butt.

We deem it proper and necessary to give a true statement and correct report to the departments to which our claims and accounts against the United States may be investigated, and to explain to the same the nature of our contract and the flattering inducements held out to us by the United States agents at Fort Smith, Arkansas, and the great risk of such a contract on our part. The country which we had to transport to and through was almost entirely unknown, and particularly so to wagoning; and the almost limitless extent of the route to which we were bound by a heavy bond to carry all and such amount of transportation which might be required for us to transport; and we were also induced to believe that the amount would be large, and that if the Belknap line of posts should be kept up we would have to do the carrying of the supplies for two years. We were particularly cautioned by Captain A. Montgomery that we should be vigilant and have a large train as soon as it was possible to be had, as the regiment was to move immediately. We complied and had everything on foot immediately, and was ready with seventy good wagons and teams

when called for, as every officer in the Fort Washita command will testify to, viz: Lieutenant Abbott, Captain Whetall, Doctor Baley, Captain Dent, and, in fact, the whole of the regiment.

Colonel Miles solicited the contract to be made with us. We will also refer you to Captain Marcy in regard to us as business men, and Colonel Loomis also.

You may think the item of corn in our account an exorbitant one ; if so, I will refer you to Major G. W. F. Wood, who told us in the spring and first part of the summer of 1852 if we had our corn that we fed to our oxen in the winter and spring that he would pay us one dollar and twenty-five cents the bushel for every bushel we had had, as he did nearly all of his teaming with little or no forage. He had to haul corn one hundred miles and pay one dollar and ten cents the bushel ; consequently at the end of the season his train was killed up and worthless. We will also refer you to Major Wood in regard to our readiness in the spring of 1852 to carry out our contract in regard to the transportation from Preston to Fort Belknap, or anything in regard to us as punctual men.

In regard to the abrogation of our contract on the part of the United States I think it is unnecessary to make any remark, as Colonel Hunt, of New Orleans, knows we went to see him in regard to it after he had made a contract with T. G. Wright for the transportation of the same that we should have had.

In conclusion we beg of you to treat our claim with due consideration, and examine our accounts on both *debit* and *credit side*, and see the amount claimed by us of the United States. The amount which we claim is a small amount to what we would have made if the United States had acted in good faith on their part with us. In our account against the United States we have said nothing of forty-two head of oxen which we lost, died and strayed ; neither have we said anything in regard to the interest on the amount which we claim as honestly due us by the United States.

Gentlemen, we cheerfully leave our claim to your honest consideration, and will willingly abide your decision.

Very respectfully, your obedient servants,

BLACK & BUTT.

Statement of moneys received by Black & Butt.

This is to show the account current of the disposition or sales of the outfit of wagons and teams, disposed of in March and April, eighteen hundred and fifty-two, after we, Black & Butt, had been officially informed or notified by Major G. W. F. Wood, assistant quartermaster of the depot at Preston, Texas, that Colonel T. F. Hunt, of New Orleans, had made other contracts and arrangements for the transportation of the government stores, &c., and that our contract was abrogated on the part of the United States, and that our services were no longer required.

United States in account with Black & Butt, Cr.

April, 1852—Sold Captain Marcy, United States army,	
20 oxen, at \$20	\$400 00
By 10 Bois d'Arc wagons and 80 oxen, at	
the rate of \$350 for each wagon, and 8 oxen	3,500 00
By 60 wagons, at \$100	6,000 00
May, 1852 — By 418 oxen, at \$30 per pair	6,270 00
In July, August, September, October, and	
November, transported 426,000 pounds of	
United States government stores, at \$3 per	
100 pounds.....	12,780 00
Total amount of cash received	28,950 00

BLACK & BUTT, *Contractors.*PRESTON, *Grayson County, Texas.**List of stores sent by train to the Brazos August 9, 1851.*

	Pounds.	Pounds.
Butt & Black, No. 11.—40 sacks flour.....		4,000
Butt & Black, No. 13.— 4 bbls. bread, 114, 106, 118,		
119.....	457	
7 bbls. sugar, 230, 225, 235,		
291, 255, 263, 265.....	1,764	
15 sacks flour, 1,500; 1 bbl.		
rice, 228.....	1,718	
		3,949
Butt & Black, No. 5.— 2 bbls. bread, 114, 115; 4		
bbls. beans, 15½ bus., 992..	1,221	
16 boxes bacon, 130, 133, 145,		
132, 159, 131, 130, 137,		
130, 136, 128, 138, 135,		
128, 162, 132.....	2,186	
5 sacks flour.....	500	
		3,907
J. Blackburn.—Iron and steel.....		2,562
J. Blackburn.—13 sacks flour, 1,300; 3 bbls. sugar,		
261, 260, 255.....	2,076	
3 bbls. rice, 235, 242, 232.....	709	
		2,785

	Pounds.	Pounds.
Wm. Allen. —Iron and steel.....	1,570	
1 box iron bedsteads.....	420	
7 boxes bacon, 128, 138, 137, 128, 145, 125, 135.....	936	
		2,926
Butt & Black, No. 12. — 6 bbls. sugar, 275, 236, 271, 243, 247, 265.....	1,537	
2 bbls rice, 240, 271; 2 bbls. bread, 111, 118.....	740	
14 sacks flour.....	1,400	
		3,677
Wm. Fitzgerald. —2 bbls. beans, 7½ bus., 480; 1 bbl. rice, 253.....	733	
4 bbls. bread, 113, 105, 115, 112...	455	
5 bbls. sugar, 262, 245, 262, 246, 276.....	1,291	
2 boxes bacon, 163, 144; 12 sacks flour, 1,200.....	1,507	
		3,976
F. N. Hackney. —3 bbls. rice, 233, 237, 235; 1 bbl. sugar, 259	964	
2 bbls. coffee, 193, 193; 3 boxes ba- con, 141, 142, 133.....	802	
6 bbls. bread, 115, 100, 98, 114, 100, 108.....	635	
12 sacks flour.....	1,200	
		3,601
Butt & Black, by T. Mylam. —12 sacks salt.....	1,200	
15 boxes soap.....	720	
15 boxes candles.....	476	
16 sacks flour.....	1,600	
		3,996
Butt & Black, by Spencer. —4 boxes bacon, 138, 141, 144, 160.....	583	
13 sacks salt, 1,300; 22 sacks flour, 2,200.....	3,500	
		4,083
Butt & Black, by Bell. —6 bbls. bread, 100, 112, 113, 100, 113, 112.....	650	
4 bbls. vinegar, 278, 294, 284, 234.....	1,090	
4 bbls. pork, 1,200; 8 sacks flour, 800.....	2,000	
		3,740

	Pounds.	Pounds.
Butt & Black, by W. Coffee.—6 bbls. apples, 720 ; 6 bbls. pork, 1,800.....	2,520	
15 sacks flour.....	1,500	
		4,020
John Martin.—11 bbls. vinegar, 292, 300, 252, 270, 284, 284, 220, 274, 274, 158, 281...	2,889	
5 boxes bacon, 145, 144, 145, 132, 117.	783	
1 sack, 100 ; 8 sacks flour, 800.....	900	
		4,572
J. Bell.—6 bbls. coffee, 202, 197, 208, 192, 186, 193..	1,178	
4 bbls. rice, 233, 227, 223, 238	921	
2 bbls. sugar, 190, 247 ; 8 sacks flour, 800..	1,237	
		3,336
J. L. Hiesten.—10 bbls. pork, 3,200 ; 1 bbl. vinegar, 286.....	3,486	
3 sacks salt.....	300	
		3,786
Robert McFall.—1 load of company stores, estimated weight.....		3,500
B. M. Carr.—17 kegs nails, 1,700 ; 2 boxes broad-axes, 55, 58.....	1,813	
3 boxes company clothing, 234, 180, 190 ; 1 bale, 80.....	684	
10 sacks flour, 1,000 ; 5 sacks salt, 500..	1,500	
		3,997
P. T. Andrews.—2 bbls. tar, 400, 168 ; 1 grind-stone, 200 ; 2 coils rope, 159, 158.....	1,085	
2 boxes company clothing, 240, 196 ; 15 sacks flour, 1,500.....	1,936	
		3,021
Butt & Black, by Ben.—4 boxes, 234, 396, 290, 155 ; 2 bales paulins, 218, 215...	1,508	
2 bales tents, 104, 106 ; 23 sacks flour, 2,300.....	2,510	
		4,018
Ingram, by Bradly.—3 boxes, 230, 230, 115 ; 6 bbls. pork, 1,920.....	2,495	
11 sacks flour.....	1,100	
		3,595

	Pounds	Pounds.
A. Myers.—3 boxes, 244, 220, 194 ; 2 bbls. bread, 111, 123.....	892	
2 bbls. pork, 640 ; 1 box stationery, 53 ; 9 sacks flour, 900.....	1,593	
		2,485
A. Myers.—32 boxes quartermaster's stores, 200, 133, 166, 200, 200, 164, 209, 155, 146, 50, 46, 57, 47, 59, 58, 61, 59, 59, 48, 60, 48, 56, 59, 59, 60, 38, 51, 47, 59, 39, 45, 59.....	2,797	
2 sacks flour, 200.....	200	
		2,997
Clark.—Iron and steel, 1,250 lbs.; 4 boxes, 200, 450, 275, 208.....	2,383	
8 kegs of nails, 800 lbs.; 6 barrels bread, 105, 121, 106, 99.....	1,231	
4 sacks flour.....	400	
		4,014
Clark.—Iron and steel, 1,250 lbs.; 2 tierces, 186, 204 ; 2 barrels pork, 640.....	2,280	
2 barrels coffee, 185, 193 ; 1 barrel bread, 108 ; 3 sacks of flour, 300.....	786	
		3,066
Geo. Graham.—4 barrels beans, $3\frac{3}{4}$, $3\frac{3}{4}$, $3\frac{3}{4}$, $3\frac{1}{2}$, 944 lbs.; 2 barrels coffee, 182, 204.....	1,330	
3 barrels sugar, 272, 258, 278 ; 4 bar- rels rice, 238, 246, 237, 230.....	1,759	
8 barrels bread, 108, 112, 105, 108, 121, 115, 112, 96 ; 2 sacks flour, 200 lbs.	1,077	
		4,166
Perry Graham.—5 barrels rice, 229, 242, 242, 248, 240 ; 1 barrel beans, 4 bushels, 256.....	1,457	
3 barrels coffee, 196, 187, 193 ; 4 sacks flour, 400 lbs.....	973	
9 barrels bread, 115, 111, 125, 114, 122, 106, 108, 120, 115.....	1,036	
3 barrels sugar, 260, 260, 268.....	788	
		4,257
Geo. Graham.—5 barrels sugar, 269, 268, 268, 257, 275 ; 2 barrels coffee, 193, 198.....	1,728	
4 barrels beans, $3\frac{1}{2}$, $3\frac{3}{4}$, 4, $3\frac{1}{4}$, 938 lbs.; 4 barrels bread, 102, 118, 119, 102...	1,379	
		3,107

	Pounds.	Pounds.
J. Howard.—4 barrels coffee, 186, 191, 185, 186; 7 barrels sugar, 260, 280, 268, 242, 248, 300, 258.....	2,604	
1 barrel beans, 4,266 lbs.; 1 barrel ap- ples, 120 lbs.....	386	
5 barrels bread, 105, 114, 106, 103, 106; 5 sacks flour, 500 lbs.....	1,034	
		4,024
D. C. Foster.—6 barrels sugar, 290, 269, 251, 285, 256, 268.....	1,619	
3 barrels coffee, 190, 195, 190; 3 bar- rels beans, 4, $3\frac{3}{4}$, $3\frac{1}{2}$, 720 lbs.....	1,295	
6 barrels bread, 94, 95, 103, 110, 107, 112; 2 sacks flour, 200 lbs.....	821	
		3,735
D. C. Foster.—3 barrels beans, 3, $3\frac{3}{4}$, $3\frac{1}{2}$, 656 lbs.; 1 barrel sugar, 252 lbs.....	908	
5 barrels coffee, 195, 195, 197, 200, 188; 3 barrels rice, 233, 243, 234.....	1,685	
1 barrel apples, 120 lbs.; 3 sacks flour, 300 lbs.....	420	
		3,013
R. S. Patten.—42 boxes soap.		2,016
R. E. Shannon.—8 barrels pork, 2,560 lbs.; 5 boxes candles, 32, 32, 33, 33, 33....	2,723	
6 boxes soap, 288 lbs.; 5 sacks flour, 500 lbs.....	788	
		3,511
Geo. Graham.—5 barrels apples, 600 lbs.; 2 screw plates, 14 lbs.; 5 barrels bread, 114, 107, 120, 121, 105.....	1,177.4	
9 sacks flour.....	900	
		2,077.4
A. Myers.—11 boxes candles, 32, 32, 32, 31, 33, 33, 31, 32, 32, 33, 32	353	
18 boxes soap, 864 lbs.; 4 barrels salt, 374, 286, 286, 286; 4 sacks salt, 800 lbs....	2,896	
1 barrel rice, 242 lbs.; 3 barrels bread, 106, 115, 120.....	593	
		3,842
W. Martin.—24 kegs nails, 2,400 lbs.; 6 barrels bread, 104, 111, 108, 99, 116, 113.....		3,050

Pounds.

Hackney.—9 barrels bread, 110, 110, 106, 110, 114,
114, 117, 116, 114; 18 kegs nails,
1,800 lbs..... 2,811

A. Myers.—4 sets w. tent poles; 20 sets c. tent poles,
450 lbs.; 2 blacksmiths' bellows, 328 lbs. 778

Butt & Black.—4 buckets.....

J. LYNDE, *Capt. 5th Infantry.*

List of stores sent by train to the Brazos, September 10, 1851.

Pounds. Pounds.

John Miller.—8 boxes bacon 137, 135, 134, 152, 136,
138, 148, 132..... 1,112
1 barrel coffee, 190 lbs.; 4 barrels apples,
440 lbs..... 630
3 barrels bread, 112, 118, 101; 5 sacks
flour, 500 lbs..... 831
————— 2,573

Thos. Yager.—18 boxes bacon, 134, 155, 136, 127, 141,
132, 145, 154, 130, 120, 144, 140,
139, 141, 131, 137, 143, 131..... 2,480
5 barrels bread, 97, 96, 117, 107, 114.. 531
5 barrels apples, 550 lbs.; 2 sacks
flour, 200 lbs..... 750
————— 3,761

Thos. Yager.—8 barrels pork, 2,560 lbs.; 3 barrels
bread, 113, 110, 97..... 2,880
1 box, 300 lbs.; 4 sacks flour, 400 lbs. 700
————— 3,580

R. Patten.—6 barrels pork, 1,920 lbs.; 4 barrels apples,
440 lbs.; 1 barrel bread, 104 lbs..... 2,464

B. J. Prigmore.—7 barrels pork, 2,240 lbs.; 7 barrels
apples, 770 lbs..... 3,010
3 barrels bread, 95, 104, 120; 2
sacks flour, 200 lbs..... 519
————— 3,529

J. H. Thomas.—7 barrels pork, 2,240 lbs.; 5 barrels
apples, 550 lbs..... 2,790
6 barrels bread, 103, 113, 119, 109,
109, 101; 1 sack flour, 100 lbs..... 754
————— 3,544

	Pounds.	Pounds
Butt & Black, No. 1.—12 barrels pork, 3,840 lbs.; 8 sacks flour, 800 lbs.....		4,640
Butt & Black, No. 2.—12 barrels pork, 3,840 lbs; 4 sacks flour, 400 lbs.....		4,240
W. Coffee.—8 barrels pork, 2,560 lbs.; 5 barrels apples, 550 lbs.....	3,110	
3 barrels bread, 222, 115, 127; 6 sacks flour, 600 lbs.....	964	
	—	4,074
Wm. Fitzgerald.—12 barrels vinegar, 223, 280, 256, 264, 256, 266, 297, 243, 298, 191, 217, 280.....	3,071	
4 boxes, 275, 165, 210, 13; 24 axe handles, 48; 7 sacks flour, 700	1,471	
	—	4,542
Butt & Black, by Dick Anderson, No. 5.—6 boxes, 265, 260, 255, 265, 200, 250; 1 bundle scythes, 50.....	1,545	
2 bundles leather, 3,585; 23 sacks flour, 2,300 lbs.	2,470	
	—	4,015
Butt & Black, by Blernson.—11 barrels vinegar, 312, 260, 298, 217, 202, 288, 284, 262, 252, 236, 308.....	2,919	
6 barrels bread, 112, 120, 112, 117, 115, 119; 3 barrels apples, 330.....	1,025	
8 sacks flour, 800 lbs.....	800	
	—	4,744
J. Compton.—3 barrels coffee, 198, 188, 198; 1 barrel sugar, 275.....	859	
5 barrels beans, 3 4 bush., 2 3 $\frac{3}{4}$ bush., 19 $\frac{1}{2}$ bushels.....	1,170	
9 barrels bread, 114, 96, 118, 117, 110, 130, 115, 123, 108; 1 barrel apples, 110.....	1,141	
	—	3,170
Butt & Black, No. 4.—1 box, 350; 1 tierce, 250; 25 kegs nails, 2,500.....	3,100	
6 barrels bread, 103, 117, 108, 115, 117, 95; 2 coils rope, 63, 64; 1 sack nails, 50.....	832	
	—	3,932
Butt & Black.—Company stores, 3,500; 5 sacks flour, 500		4,000

Pounds. Pounds.

Butt & Black.—10 barrels bread, 100, 114, 104, 108,
115, 112, 108, 108, 102, 121..... 1,092
32 sacks flour, 3,200..... 3,200
————— 4,292

Butt & Black.—7 barrels bread, 109, 102, 122, 105,
107, 115, 112..... 772
1 barrel apples, 110 ; 37 sacks flour,
3,700..... 3,810
————— 4,582

D. C. Foster.—6 barrels beans, 4 $3\frac{3}{4}$ bush., 1 4 bush.,
1 $3\frac{1}{2}$ bush.; 22 $\frac{1}{2}$ bush..... 1,350
1 barrel sugar, 265 ; 3 barrels coffee,
199, 193, 186..... 843
9 barrels bread, 113, 106, 109, 116,
116, 101, 112, 118, 111..... 1,002
3 sacks flour, 300 lbs..... 300
————— 3,495

M. Willmeth.—3 barrels coffee, 196, 191, 195 ; 1 bar-
rel beans, $3\frac{3}{4}$ bush., 225..... 807
4 barrels sugar, 267, 260, 259, 255.... 1,041
11 barrels bread, 96, 107, 114, 105, 114,
110, 111, 106, 103, 112, 100..... 1,178
————— 3,026

J. B. Compton.—4 sacks flour, 400 lbs..... 400

Mylam.—4 sacks flour, 400 lbs..... 400

Butt & Black, by Bois d'Arc wagon—11 barrels sugar,
250, 250, 252, 265, 255, 256, 269, 235, 248, 259,
276..... 2,815
22 sacks flour, 2,200..... 2,200
————— 5,015

Willcox, by Throgmorsen.—6 barrels pork, 1,920 lbs. ;
4 barrels bread, 107, 108, 108, 109..... 2,352

Willcox.—8 barrels pork, 2,560 lbs. ; 3 barrels bread,
106, 112, 104..... 2,882
5 barrels apples, 550 ; 5 sacks flour, 500.... 1,050
————— 3,932

Holmes.—10 barrels pork, 3,200 lbs..... 3,200
3 barrels bread, 118, 108, 112 ; 5 barrels
apples, 550..... 888
————— 4,088

	Pounds.	Pounds.
Holmes.—8 barrels pork, 2,560 ; 6 boxes axes, 67 lbs., 402 lbs.....	2,962	
8 barrels bread, 112, 117, 109, 105, 106, 119, 108, 102.....	878	
		3,840
Abraham Myers.—9 barrels pork, 2,880 lbs ; 1 sack flour, 100 lbs.....	2,980	
9 barrels bread, 113, 108, 124, 112, 114, 114, 108, 112, 113.....	1,018	
		3,998
Abraham Myers.—8 barrels pork, 2,560 lbs ; 1 sack flour, 100 lbs.....	2,660	
9 barrels bread, 111, 110, 113, 101, 104, 117, 103, 119, 106.....	984	
		3,644
P. T. Andrews.—17 sacks flour, 1,700 lbs. ; 8 barrels bread, 101, 112, 119, 129, 114, 104, 131, 117.....		2,627
Winters.—4 barrels bread, 107, 106, 92, 126.....	431	
6 sacks flour, 600 lbs. ; 6 barrels pork, 1,920.....	2,520	
		2,951
Hackney.—12 barrels bread, 108, 114, 129, 111, 94, 92, 100, 101, 107, 108, 95, 96.....	1,255	
6 barrels pork, 1,920 lbs.....	1,920	
		3,175
Fitzgerald.—40 sacks flour, 4,000.....		4,000
A. Myers's two wagons.—1 mill ; 1 grindstone.....	3,700	
23 sacks flour, 2,300.....	2,300	
		6,000
Clark.—9 barrels bread, 107, 116, 110, 112, 108, 116, 121, 107, 106.....	1,003	
27 sacks flour, 3,700.....	2,700	
		3,703
Clark.—10 barrels bread, 106, 113, 105, 117, 98, 113, 109, 104, 112, 110.....	1,087	
1 bundle scythe snathes, 22 lbs ; 24 sacks flour, 2,400 lbs.....	2,422	
		3,509
Ingram.—35 sacks flour, 3,500 lbs.....		3,500

Pounds. Pounds.

W. T. Lankford.—6 barrels bread, 117, 110, 120, 104,
130, 105..... 686
1 barrel apples, 110; 32 sacks flour,
3,200 3,310
————— 3,996

Blundlen, by J. Blackwell, Cr.—8 barrels bread, 108,
107, 128, 112, 110, 106, 110, 93..... 874
26 sacks flour, 2,600..... 2,600
————— 3,474

Total..... 136,807

J. LYNDE,
Captain 5th Infantry.

Dec. 15	J. Ingram -----	14	2,356	14	2,342	3	596	4	592
	Emberson -----	21	4,914	24	4,890				
	Shannon -----	-----	-----	-----	-----	19	3,114	23	3,091
	Fitzgerald -----	15	3,192	18	3,174	2	257	2	255
	Matthews -----	18	2,992	16	2,976				
	Kelton -----	24	3,821	21	3,800				
	Fitzgerald -----	24	3,853	22	3,831				
	Beall -----	29	4,584	23	4,561				
	Fitzgerald -----	24	3,909	20	3,889				
	Reynold -----	14	2,937	18	2,919	3	475	3	472
Dec. 18	Rowlett -----	14	3,066	18	3,048	4	502	4	498
	Henry -----	22	3,672	19	3,653				
	Potts -----	22	3,547	17	3,530				
	Matthews -----	22	3,398	18	3,380				
	Owen -----	22	3,517	17	3,500				
	Reynold -----	22	3,505	17	3,488				
	Blevun -----	20	3,108	16	3,092				
		548	97,872	498	97,374	355	45,329	319	45,010

Corn—97,374 pounds, at 52 pounds per bushel, = 1,872 bushels and 18 quarts.

Oats—45,010 pounds, at 32 pounds per bushel, = 1,406 bushels and 18 quarts.

Received, new post on Red Fork, Brazos, Texas, of G. N. Butt and John D. Black, corn and oats contractors, eighteen hundred and seventy-two bushels eighteen quarts of corn, and fourteen hundred and six bushels eighteen quarts of oats, as per annexed statement.

I enclose with this a war warrant for \$2,100, which pays for 875 bushels of the corn above referred to.

Corn, bushels, 1,872 $\frac{1}{2}$.

Oats, bushels, 1,406 $\frac{1}{2}$.

E. T. ABBOTT,

1st Lieutenant 5th Infantry, regiment mounted rifles.

QUARTERMASTER GENERAL'S OFFICE,
Washington, July 5, 1856.

SIR: I herewith enclose the papers in the claim of Messrs. Black & Butt, as requested in your letter dated the 2d ultimo.

These papers were received from the Hon. J. P. Edgerton, chairman of the Committee of Claims, on the 7th February, 1854, with a request that the committee be furnished with all the important facts known to this office in relation to the claim. At that time there were no facts on file here which would throw sufficient light upon the matter, and measures were taken to procure them. One of the officers whose statement was deemed necessary, the late Brevet Major G. W. F. Wood, died before making a report, and the other I had no opportunity of obtaining one from, owing to his absence on duty in the field. Believing then, as I do now, that the claim is without any foundation in justice, the papers were laid aside and escaped notice in the multiplicity of business until called upon for them on the second ultimo.

In the year 1851 several important changes of the stations of the troops were made on the northern frontier of Texas, which required more means of transportation than could be supplied by the public teams then in that section of the country. Measures were taken to supply this deficiency, and the officer who had charge of the movements (Captain Alexander Montgomery, assistant quartermaster at Fort Smith, Arkansas) informed of them. Previously to its arrival, however, it became necessary for him to hire transportation for part of the stores, and Captain Montgomery entered into the contract with Messrs. Black & Butt upon which they base their claim for damages. On the receipt of the contract at this office, Captain Montgomery was reminded that contracts for transportation should not be made for a year without special instructions from the Quartermaster General's office; but it was noticed in regard to this one that "as the contractors were bound to transport such army stores as were delivered to them only, and that the public was not bound to furnish any stated quantity, should the public teams sent him prove sufficient for the service the contract would cease to operate." This shows the construction placed upon the contract here at the time, and it is the same as would be applied to it by the accounting officers of the treasury were it submitted to them; it is the same also placed upon it by Captain Montgomery, who made it, as will be seen by his letter dated June 16, 1856, a copy of which is herewith enclosed. It will be seen by his letter that he remained at Fort Smith until the spring of 1854, and never was informed by the contractors that they were dissatisfied with his decision or intended claiming damages.

Upon an examination of the papers filed by the memorialist through an agent, it appears that at no time during the year 1851 had they more than *thirty-eight* wagons employed in executing their contract on the route from Preston to Fort Belknap, and that of these 38 but *nine* were owned by them. The remainder, it would appear, were owned by about twenty different persons whom they employed to enable them to perform the service. Yet the memorialists, by their

agent, state that sixty-eight large road wagons were purchased. The distance from Preston to Belknap is estimated in the contract at 158 miles; a trip could be made in 25 to 30 days, and as it appears from the statements submitted that 403,278 pounds of army stores were transported from June to December, 1851, that all could have been transported by about *thirty* good wagons and teams. The contractors were employed by their agreement nearly six months in 1851, during which they hauled, as above, 403,278 pounds, at three cents per pound, \$12,098 34; with this they were, it seems, satisfied. By the terms of their contract they ceased work the 1st December, 1851, and could not be called upon to perform any service until the 15th March, 1852. The contract ceased the 6th June, 1852; had these been stores to haul, and had they hauled them, they would have earned in 1852, at the same ratio, about \$6,000; yet they claim at least \$15,000 damages, twice and a half more than they would have earned.

The only evidence submitted with the memorial is an affidavit of one Joseph Blackwell, and which is in conflict with the memorial. Blackwell *thinks* the contract was taken from his employers early in the fall of 1851, and by "the heavy losses on the cattle when sold in the fall" they suffered "damage to the amount of \$15,000," while the memorial states "that the keeping of so many oxen through the winter, in order to have them strong enough to do service in the spring, involved a heavy expense," &c.

The memorial states that the contractors "were put to an enormous expense in the purchase of large trains of wagons and teams, to wit, 68 large road wagons and 272 yokes of oxen;" if they were purchased it could not have been warranted under the contract, and I do not consider the public liable for the mismanagement or want of judgment on the part of the contractors.

The memorialists acknowledge they were notified there would be no stores for transportation in 1852, but they were not released from their bond. What they mean by this is not understood, as they certainly were released when the contract ceased to have effect, and it could not be renewed without a new and mutual agreement of both parties. They also complain of injustice having been done them by a contract having been made with Travis Wright in the spring of 1852, for the transportation of army stores from Wright's Landing, on Red river, to Preston, whereas this contract was made in New Orleans January 7, 1852, upwards of two months before the United States could have called on the memorialists in that year to perform any service under their contract. It was a contract for the delivery of stores from a distance *at* Preston. Captain Montgomery had nothing to do with it; and the quartermaster at Preston had no agency or control over it further than to receive the stores on their arrival. The memorialists have no right whatever to complain, as not a pound of the stores passed over any part of the route embraced in their contract.

It may be proper to state that Messrs. Black & Butt had been engaged in various contracts with the department in the transportation of troops, stores, and furnishing forage, (corn and oats,) and were, at the very time, under a contract for the delivery of 4,000

bushels of corn and 6,000 bushels of oats at Fort Belknap, between the 1st of October, 1851, and the 20th of May, 1852. Even in the execution of this contract it would appear that many private wagons were employed by them and but few of their own; had they had at the time sixty-eight large road wagons, why were they not employed?

I consider the claim upon the evidence submitted and the facts ascertained to be without any foundation whatever.

Copies of the papers referred are herewith enclosed.

I remain, sir, very respectfully, your obedient servant,

THOMAS S. JESUP,

Quartermaster General.

Hon. JAMES BISHOP,

Acting Chairman Committee on Claims,

Washington, D. C.

QUARTERMASTER GENERAL'S OFFICE,

Washington City, August 7, 1851.

CAPTAIN: Your letter of the 11th ultimo, enclosing your monthly papers for June, and contracts for transportation of stores and a supply of hay, to be delivered at Fort Smith, is received.

It would appear from your letter that you had not received the fifty mule-wagons and teams which were sent you from Fort Leavenworth, nor that General Stanton had advised you of their having been sent. I trust that they will have arrived in time to take the place of the contractor's ox-teams which have been destroyed by disease.

In regard to the contract made with Black & Butt, I have to remark that contracts for transportation should not be made for a year without first having received special instructions from this office; but, as I observe, they are only bound "to transport such army stores as the assistant quartermaster at Preston may require," and that he is not bound to furnish any given quantity; should your public teams prove to be sufficient for all purposes, the contract will cease to operate and no inconvenience will arise from its having been made.

CHARLES THOMAS,

Deputy Quartermaster General, in charge.

Captain A. MONTGOMERY,

Assistant Quartermaster, Fort Smith, Arkansas.

WASHINGTON, June 16, 1856.

GENERAL: I have examined the claim of Messrs. Black & Butt for losses sustained by reason of the contract concluded June 7, 1851, between these gentlemen and myself. At the time this contract was entered into it was well understood by them, and it is so expressed in the contract, that they were to transport *only* such stores and baggage

as the officers of the quartermaster's department might require them to transport from Preston, Texas, to the posts to be established on the waters of the Brazos river. They were bound by the contract to hold themselves in readiness for the space of "one year" or longer, as might be determined by *myself* or by my *successor*, to meet any demand that might be so made upon them for such transportation; but there is nothing in the contract giving them the exclusive right to transport any amount of freight whatever, so that I might at any time have employed any other transporter without violation of the contract. The contract was purposely so drawn, in order that I might *at any time* dispense with the services of the contractors on finding that the interest of the service would best be subserved by doing so. Accordingly, when the number of public teams under my control sufficed to meet all the demands for transportation upon that line, it no longer was necessary to call upon Messrs. Black & Butt, and they were so informed, although there is nothing in the contract stipulating that they were to receive any notice of the requirements of the department beyond such as might be necessary to enable them to assemble their teams at the depot as occasions required. In July, 1851, a large train of public wagons and teams was sent me from Fort Leavenworth for this service, which so increased my means of transportation that in the spring of 1852 it was not found necessary to employ the wagons and teams of the contractors; and so, as contemplated by the contract, their service was dispensed with.

When Mr. Butt proposed to contract for this service, to satisfy me of his ability to perform it, he stated to me that he had then a number of teams of his own which he employed in hauling from Towson Landing, and from Shreveport to Preston, and that he could *hire* other wagons and teams in the vicinity of Preston. Accordingly, in a settlement I made with him for twenty-four wagons furnished at Preston depot, and eighteen wagons at Washita, in June, 1851, under this contract, the services of which were not immediately required, the cholera having arrested at Fort Smith, Arkansas, the march of the troops for whom transportation to the Brazos had been ordered, Mr. Butt presented receipts from a number of persons of whom he had hired wagons, to establish the fact that he had incurred expenses to a certain amount. If I mistake not, there is a statement filed in the office of the Third Auditor, showing how many of these wagons and teams were claimed by Messrs. Black & Butt, and how many belonged to others. Thus it may have been that there were as many wagons and teams employed by the contractors during the summer and fall of 1851 as represented; but the affiants do not state that they all belonged to Messrs. Black & Butt, or how many were employed at any one time in their service. Were the claim at all admissible, they could only claim for such wagons and teams as were actually purchased by them for this service, (not including those they had before entering upon the contract,) and were owned by them, and employed under this contract during the period alleged. By hiring on each occasion from different individuals, the number of different wagons and teams employed might very well have amounted to the number stated by affiants, and yet but a comparatively small number

have been employed during any one period. The evidence is deficient in this respect. But I cannot find in the contract, or in the circumstances connected with it, any ground whatever for the claim. The claimants knew well that should my means of transportation be increased, I could not give them employment. For this contingency they should have been prepared. They knew in August, 1851, that I had received a large accession of means of transportation, which would in all probability be employed during the succeeding spring in lieu of their teams. Knowing this, if they encumbered themselves with property with so little hope of employing it profitably, they simply committed an imprudence for which the quartermaster's department is in no way answerable.

With the transportation of supplies from Wright's Landing their contract had nothing to do. It only contemplated the transportation of stores, &c., from Preston, Texas, to the Brazos river.

Although I remained on duty at Fort Smith until the spring of 1854, it was only the other day that I learned that Messrs. Black & Butt had preferred this claim, or that they were dissatisfied with the action of the officers of the department under their contract.

The contract was made under special instructions from General Arbuckle, then commanding the 7th military department.

A. MONTGOMERY,

Captain, Assistant Quartermaster, U. S. A.

Maj. Gen. THOMAS S. JESUP,

Quartermaster General, U. S. A., Washington, D. C.

IN THE COURT OF CLAIMS.

GEO. N. BUTT, SURVIVING PARTNER OF BLACK & BUTT, *vs.* THE UNITED STATES.

PETITIONER'S BRIEF.

Statement.

On the seventh day of June, A. D. eighteen hundred and fifty-one, the said firm of Black & Butt entered into a contract with Captain Alexander Montgomery, assistant quartermaster of the United States army, to transport from Preston, Texas, to the post about to be established on the Brazos river, Texas, (assumed distance 158 miles,) such army stores and army baggage as the assistant quartermaster at Preston might require them to transport to said post on the Brazos; that they would deliver the said stores and baggage to the assistant quartermaster at the aforesaid post on the Brazos in the like order and condition as when received from the said assistant quartermaster at Preston, without unavoidable delay, unavoidable losses and damages only excepted; that they would provide good well-covered wagons and serviceable teams, with competent drivers, for this service; and

that they would transport said stores as above stated whenever so required to do, except between the first day of December and the fifteenth day of March in each year that the said contract should remain in force; and the said Captain Montgomery, on behalf of the United States, promised and agreed to pay to the petitioners three dollars for each and every hundred weight of army stores and army baggage which they should transport as above stated, and pro rata for the transportation of said stores and baggage to any point or points west of the Brazos river; and the said Captain Montgomery, assistant quartermaster, promised and agreed to cause sufficient military protection to be afforded to the teams employed as aforesaid, provided said teams were to be made to move in such order as the officers in command of escorts should direct, and that the said contract should remain in force for one year from the date thereof, or longer, as might be determined by the said Captain Montgomery, assistant quartermaster, or his successors.

For the faithful performance of their contract they entered into a bond with approved securities in the penal sum of fifty-two thousand dollars; and, to enable petitioners to comply promptly with the terms of their said contract, they purchased and employed a large train of wagons and teams, to wit, sixty-eight large road wagons, drawn by about two hundred and seventy-two yoke of oxen, and hired the necessary number of teamsters and laborers to attend and manage the same; and faithfully transported all the military stores and baggage and performed all the services required of them by their contract during the year 1851. Never doubting the continuance of their said contract for the full period of at least one year, they were at considerable trouble and expense in the care of such teams and wagons as they had purchased and kept on hand through the winter, to enable them to resume promptly on the 15th day of March, 1852, the execution of their said contract; and on the said 15th of March, or thereabouts, they reported themselves to Captain G. F. Wood, assistant quartermaster of the United States army at Preston, the successor of said Captain Montgomery, as ready to resume the transportation required of them by their contract, when they were verbally informed that their contract was at an end and abrogated by the United States, without alleged fault on the part of your petitioners.

About the time of the abrogation of their said contract by the United States, another contract was entered into by the government of the United States with one T. G. Wright, of Red River county, Texas, for the transportation of army stores, &c., from Wright's Landing, on Red river, to Preston, instead of employing the teams of the petitioners in this service, to their very great loss and injury.

They allege that they had faithfully and promptly performed all the service required of them by their contract during the hauling season of 1851, and they allege that in consequence of the sudden and unexpected abrogation of their contract, which they had been led to believe would last not only the one year, but for several years, they have sustained great loss and damage. They further represent that they have only received from the United States, on account of said contract, the gross amount of \$28,950, which would not have sufficed

even to feed the number of oxen employed in the service through the winter.

No question arises in relation to the authority of the quartermaster, Montgomery, to make the contract, nor as to the liability of the government for the fulfilment of the contract so made. The claim on the part of the United States is, that the contract has not been violated.

I. As to the provision of the contract.

1. It was the positive and express stipulation of the contract that it should continue in force at least one year, and longer, if the officer of the quartermaster's department should so determine. The language of the contract is as follows, (Rec., p. 6 :) "This contract to remain in force for one year from date, or longer, as may be determined by the said Captain A. Montgomery, assistant quartermaster, or by his successor."

2. The said contractors, Black & Butt, agreed (Rec., p. 6,) "to transport from Preston, Texas, to the post about being established on Brazos river, Texas, such army stores and army baggage as the assistant quartermaster at Preston may require them to transport to said post on the Brazos." They were then bound by the contract to take and transport all the goods which might be required of them.

3. They also agreed to do this "without unreasonable delay;" "to provide well-covered wagons with serviceable teams and competent drivers," and this was to be done "in each year during which the contract shall remain in force."

4. The quartermaster, on behalf of the United States, agreed to pay "three dollars for each and every hundred weight" transported, and pro rata to any point west of the Brazos river.

5. Captain Montgomery promised "to cause sufficient military protection to be afforded to the teams employed."

6. The following provision was made in relation to the times of payment:

"The payments under this contract to be made quarter-yearly, or as soon after the expiration of the last quarter as it may be possible for the said Captain A. Montgomery, assistant quartermaster, or his successor, to procure funds wherewith to make the payments."

7. A bond, with surety, for \$52,000, that Black & Butt shall "faithfully perform all the stipulations of a contract for the transportation of army stores and army baggage from," &c., "according to the true intent and meaning thereof."

In pursuance of this contract, from the 12th July to the autumn of 1851, Black & Butt continued to transport public stores, in relation to which no question arises. In the spring of 1852, regarding the contract as still in force, having made their arrangements for the transportation, they stated their readiness to transport supplies, but no such were furnished during the remaining period specified in the contract.

The ground upon which the government refuse to pay is found in some expressions in the contract, viz: "*Such army stores and army baggage as the assistant quartermaster at Preston may require them to transport.*"

The Quartermaster General, under date of July 5, 1856, (Rec., p. 22,) says: * * "Captain Montgomery entered into the contract with Messrs. Black & Butt, upon which they base their claim for damages. On the receipt of the contract at this office, Captain Montgomery was reminded that contracts for transportation should not be made for a year without special instructions from the Quartermaster General's office; but it was noticed, in regard to this one, that "as the contractors were bound to transport such army stores as were delivered to them only," and "that the public was not bound to furnish any stated quantity, should the public teams sent him prove sufficient for the service, the contract would cease to operate. This shows the construction placed upon the contract here at the time, and it is the same as would be applied to it by the accounting officers of the treasury were it submitted to them."

And in the letter of the 17th of August, 1851, from the deputy quartermaster general in charge to Captain Montgomery, it is stated, (Rec., p. 24 :) "In regard to the contract made with Black & Butt, I have to remark that contracts for transportation should not be made for a year without first having received special instructions from this office; but as I observe they are only bound to transport," &c.

We contend that this is not the true and just interpretation of this contract, and could not at the time have been so understood by the parties.

From the very nature of the contract, there must necessarily be some uncertainty always as to the quantity of transportation which the government might, at any time, require from one post to another. This might arise from the removal of troops and many other contingencies connected with military service. To these uncertainties this contract, and all other contracts of a similar kind, was necessarily exposed.

But all the provisions of the contract show that it was not the understanding of the parties that it was entirely in the discretion of an officer to render nugatory the contract the very day after it was signed. It was made expressly and positively for one year. This was unconditional and not under the control of either party to change. The *discretion* to the United States officer was, if he should so elect, to continue the contract for a longer time. It was very idle to make any such provision as this if the parties understood that one of them might, at his discretion, refuse to deliver any public stores or baggage under it.

The provision as to quarter-yearly payment shows the fair understanding of the parties as to the continuance of this contract for at least a year, not that it should remain a contract merely nominally, and as a dead letter, but that the service under it was to be performed and the money to be paid for that service throughout the entire year.

By taking the whole contract, together with the accompanying bond, a construction is arrived at which, at the same time that it is in accordance with the sound and well-settled rules of interpretation, is far more creditable to the intelligence and integrity of the government and its officers than that construction which would destroy all

mutuality in the contract, and render it as inconsistent with itself as it would be unjust.

If the government designed to abandon the contract, reasonable notice should have been given to the other party of their intention.

The amount of damages sustained for the violation of the contract is shown by the proof contained in the printed record.

JOHN A. ROCKWELL,
Of Counsel for Petitioner.

IN THE COURT OF CLAIMS.

GEORGE N. BUTT, SURVIVOR, etc., *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF ON FINAL HEARING.

Claim for damages for annulling a contract to transport military stores from Preston to Fort Belknap, on the Brazos, in Texas.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. That the United States were about establishing a military post, in 1851, on the Brazos, and not having at the time sufficient teams to transport military stores from Preston to that place, entered into a contract with Black & Butt for transportation. (Montgomery's letter, Record, p. 24.)

Second. That they agreed to transport such stores and army baggage as the assistant quartermaster at Preston might require, at a specific price, which contract was to remain in force for one year or longer, as Captain Montgomery, the acting quartermaster, or his successor, shall determine. There is no provision as to what force of teams they should have, nor that they should have all the transportation between the two points. (Contract, Record, p. 6.)

Third. The contractors received and transported such stores as were at Preston from the date of their contract until the end of the season for transportation on the 1st of December, 1851. (Petition to Congress, Record, p. 5.)

Fourth. That the contract of which the claimants complain as having been made with T. G. Wright, and which interfered and prevented their transporting stores in 1851, was not to convey stores from Preston to Fort Belknap, but to take to Preston.

General Jesup (Record, p. 23) says: "They (the claimants) complain of injustice having been done them by a contract having been made with Travis Wright, in the spring of 1852, for the transportation of army stores from Wright's Landing, on Red river, to Preston; whereas this contract was made in New Orleans January 7, 1852, upwards of two months before the United States could have called on the memorialists in that year to perform any service under their contract. It was a contract for the delivery of stores from a distance *at* Preston. Captain Montgomery had nothing to do with it, and the quartermaster at Preston had no agency or control over it, further

than to receive the stores on their arrival. The memorialists have no right whatever to complain, as not a pound of the stores passed over any part of the route embraced in their contract." (Record, p. 23.)

Fifth. The stores which were taken from Preston to Fort Belknap were transported by government teams, and when the contractors made their contract they understood that said contract was not to interfere with the use of government teams when they could be used on the route, and the claimant makes no complaint in his petition of the use of such teams by the quartermaster's department.

Captain Montgomery says: "The claimants know well that should my means of transportation be increased, I could not give them employment. For this contingency they should have prepared. They knew in August, 1851, that I had received a large accession of means of transportation, which would in all probability be employed during the succeeding spring in lieu of their teams." (Record, p. 26.)

Again he says: "But there is nothing in the contract giving them the exclusive right to transport any amount of freight whatever, so that I might at any time have employed any other transporter without violation of the contract. The contract was purposely so drawn in order that I might *at any time* dispense with the services of the contractors on finding that the interest of the service would be best subserved by so doing." (Record, p. 25.)

Sixth. The contractors were notified by Captain Montgomery that their teams would not be wanted, so that they did not necessarily keep their teams until 1852 in order to fulfil their contract.

Capt. Montgomery says: "Accordingly, when the number of public teams under my control sufficed to meet all the demands for transportation upon that line, it no longer was necessary to call upon Messrs. Black & Butt, and they were so informed, although there is nothing in the contract stipulating that they were to receive any notice of the requirements of the department beyond such as might be necessary to enable them to assemble their teams at the depot as occasion required. In July, 1851, a large train of public wagons and teams were sent to me from Fort Leavenworth for this service, which so increased my means of transportation, that in the spring of 1852 it was not found necessary to employ the wagons and teams of the contractors, and so, as contemplated by the contract, their service was dispensed with." (Record, p. 25.)

Blackwell says he was wagon-master for the contractors "from the commencement of the hauling season in 1851—say about the first of June—to the time the contract was taken from Messrs. Black & Butt, which affiant thinks was early in the fall of 1851." (Record, p. 9.)

This undoubtedly relates to the notice given by Capt. Montgomery.

Seventh. The contractors did not purchase many wagons and teams, if any, to enable them to perform this contract.

In their petition to Congress, the contractors state "that in order to comply with their contract, they were put to an enormous expense in the purchase of large trains of wagons and teams, to wit: sixty-eight large road wagons and two hundred and seventy-two yoke of oxen; that the wagons and teams cost, upon an average, three hundred and fifty dollars." (Record, p. 5.)

The same statement is substantially made in the petition to this court, except as to the cost. (Record, p. 4.)

This statement is not supported by one word of evidence. Neither Blackwell nor Fitzgerald (Record, p. 9) swear to an actual purchase of any particular number of wagons or teams. The former merely says he "had to purchase a large number of wagons and teams."

Capt. Montgomery says: "When Mr. Butt proposed to contract for this service, to satisfy me of his ability to perform it, he stated to me he had then a number of teams of his own which he employed in hauling from Towson Landing and from Shreveport to Preston, and that he could *hire* other wagons and teams in the vicinity of Preston.

Accordingly, in the settlement I made with him for 24 wagons furnished at Preston depot, and 18 wagons at Washita, in June, 1851, under this contract, the services of which were not immediately required, the cholera having arrested at Fort Smith, Arkansas, the march of the troops for whom transportation at the Brazos had been ordered, Mr. Butt presented receipts from a number of persons of whom he had hired wagons to establish the fact that he had incurred expenses to a certain amount. If I mistake not, there is a statement filed in the office of the Third Auditor showing how many of these wagons and teams were claimed by Messrs. Black & Butt, and how many belonged to others." (Record, p. 25.)

General Jesup says: "Upon examining the papers filed by the memorialists through an agent, it appears that at no time during the year 1851 had they more than *thirty-eight* wagons employed in executing their contract on the route from Preston to Fort Belknap, and that of this thirty-eight, but *nine* were owned by them. The remainder, it would appear, were owned by about twenty different persons whom they employed to enable them to perform the service." (Record, p. 22.)

From this it appears that the contractors really owned but *nine* wagons and teams, and that they hired all the others that were employed in the transportation in question.

Eighth. There is no evidence that the contractors could not find full employment for the teams which they owned after the time that they were notified that the government would not further employ them in the service in question.

Ninth. That the petition in this case is not sworn to by the claimant, or by any other person.

LEGAL PROPOSITIONS.

FIRST. *The evidence shows no contract for the exclusive transportation of stores.*

This is the true construction of the contract. The contractors obligated themselves to transport the stores when requested, but there is no obligation on the part of the government to give them any transportation whatever. Hence, the contract does not sustain the claim.

SECOND. *No damages can be sustained where there has been no violation of contract.*

Neither argument nor authority is necessary to establish this proposition.

The evidence is conclusive that there was no violation of the contract on the part of the government. It performed all it engaged with the contractors, and gave them early notice that they would not be further called upon under the contract.

The formal demand of transportation made in 1852 upon Captain Wood was wholly unnecessary, as notice had been previously given to the contractors. This act looks like an afterthought, and a studied intention to take advantage, on account of Captain Montgomery's absence, and bring the government in for damages for keeping teams through the winter, when they were notified before the winter that they would not be further wanted.

THIRD. *The affidavits of Blackwell and Fitzgerald are not legal evidence, being wholly ex parte; nor are the statements of the claimants evidence.*

This proposition is too elementary to need authority or argument to sustain it.

R. H. GILLET, *Solicitor.*

SEPTEMBER 3, 1858.

IN THE COURT OF CLAIMS.

MAY 31, 1859.

GEORGE N. BUTT, survivor, &c., *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

On the 7th day of June, A. D. 1851, Messrs. Black & Butt entered into a contract with the United States, whereby the former, for the consideration therein named, agreed to transport from Preston, Texas, to the post then about to be established on the Brazos river, Texas, (assumed distance one hundred and fifty-eight miles,) such army stores and army baggage as the assistant quartermaster at Preston might require them to transport to that post; to deliver such stores and baggage to the assistant quartermaster at that post in like order and condition as when received from the assistant quartermaster at Preston, without unreasonable delay, unavoidable losses and damages only excepted; to provide good, well-covered wagons and serviceable teams, with competent drivers, for the service; and to transport the stores as above stated when so required to do, except between the first of December and the fifteenth of March in each year the contract should remain in force.

The United States, on their part, agreed to pay Black & Butt three dollars for each and every hundred weight of army stores and bag-

gage which they should transport as above stated, and *pro rata* for the transportation of such stores and baggage to any point or points west of the Brazos river, and to cause sufficient military protection to be afforded to the teams employed as above stated, provided the teams should be made to move in such order as the officers in command of escorts should direct.

The contract was to remain in force for one year from its date, or longer, as might be determined by the assistant quartermaster, through whom the contract on the part of the United States was made, or by his successor, and the payments under it were to be made quarterly, or as soon after the expiration of each quarter as it might be possible for such assistant quartermaster or his successor to procure funds wherewith to make the payments.

The petitioner avers in his petition as follows :

1. That, to enable them to comply promptly with the terms of their contract, Black & Butt purchased and employed sixty-eight large road wagons, drawn by about two hundred and seventy-two yoke of oxen, and hired the necessary number of teamsters and laborers to attend to and manage the same; and that they faithfully transported all the military stores and baggage, and performed all the service required of them by their contract during the year eighteen hundred and fifty-one.

2. That Black & Butt were at considerable expense in the care of such teams and wagons as they had purchased and kept on hand through the winter to enable them to resume promptly on the 15th of March, A. D. 1852, the execution of their contract; and that on the 15th of March, A. D. 1852, or thereabouts, they reported themselves to the assistant quartermaster at Preston as ready to resume the transportation required of them by their contract, when they were verbally informed that their contract was at an end and abrogated by the United States, without alleged fault on their part, and to their great damage.

3. That about the time of the abrogation of the contract between the United States and Black & Butt, the United States entered into a contract with T. G. Wright for the transportation of army stores, &c., from Wright's Landing, on Red river, to Preston, instead of employing the teams of Black & Butt in this service, to their very great loss and injury.

4. That Black & Butt have only received from the United States, on account of their contract with them, the gross amount of \$28,950, which would not have sufficed even to feed the number of oxen employed in the service throughout the winter.

1. As to the first averment:

There is on file in this case an *ex parte affidavit* of Joseph Blackwell, made in October, A. D. 1853, in which he states that "from the commencement of the hauling season in 1851, say about the first of June, to the time the contract was taken from Messrs. Black & Butt, which affiant thinks was early in the fall of 1851, the train of wagons and teams engaged in said transportation consisted of from sixty to seventy wagons."

There is also on file in this case an *ex parte affidavit* of S. W. Fitzgerald, made on the 10th day of November, A. D. 1853, in which he

states "that all the facts set forth in Blackwell's *affidavit* are, as affiant verily believes, true."

These affidavits were sent to this court from the House of Representatives, but it does not appear that the affiants are dead or beyond the reach of the petitioner. The affidavits, therefore, not having been taken according to the rules of this court, are inadmissible in evidence in this case.

The Quartermaster General, in a letter to the chairman of the Committee on Claims, House of Representatives, dated July 5, A. D. 1856, said: "Upon an examination of the papers filed by the memorialists, through an agent, it appears that at no time during the year 1851 had they more than *thirty-eight* wagons employed in executing their contract on the route from Preston to Fort Belknap, and that of these thirty-eight but *nine* were owned by them. The remainder, it would appear, were owned by about twenty different persons, whom they employed to enable them to perform the service; yet the memorialists, by their agent, state that sixty-eight large road wagons were purchased."

It is not pretended by the United States that Black & Butt were required to render any services which they did not render, or by Black & Butt that they were not fully compensated for all the services actually rendered by them.

The petitioners state that they *purchased* and *employed* sixty-eight large road wagons, &c. This statement is not supported by the evidence.

2. As to the second averment:

Joseph Blackwell, in his *affidavit* already noticed, states that the contract was taken from Black & Butt, he thinks, early in the fall of 1851. He also states that, "considering the high prices paid for their teams *in the spring*, and the heavy losses on them when sold *in the fall*," &c. And S. W. Fitzgerald states that all the facts stated by Blackwell are, as he verily believes, true.

Captain A. Montgomery, the assistant quartermaster, through whom, on the part of the United States, the contract with Black & Butt was made, in a letter to the Quartermaster General dated June 16, A. D. 1856, stated: "Accordingly, when the number of public teams under my control sufficed to meet all the demands for transportation upon that line, it no longer was necessary to call upon Messrs. Black & Butt, and they were so informed, although there is nothing in the contract stipulating that they were to receive any notice of the requirements of the department beyond such as might be necessary to enable them to assemble their teams at the depot as occasion required. In July, 1851, a large train of public wagons and teams were sent me from Fort Leavenworth for this service, which so increased my means of transportation that in the spring of 1852 it was not found necessary to employ the wagons and teams of the contractors, and so, as contemplated by the contract, their service was dispensed with."

Joseph Blackwell, in his *affidavit*, states "that, in his opinion, considering the high prices paid for their teams in the spring, and the heavy losses on them when sold in the fall, and the many other inci-

dental expenses incurred by Messrs. Black & Butt to prepare for the completion of their heavy contract, the said Black & Butt suffered damages to the amount of fifteen thousand dollars by the taking of the contract from them."

S. W. Fitzgerald, in his *affidavit*, states "that the damage sustained by said Black & Butt, as estimated by said Blackwell, is, in the opinion of the witness, rather under than over the real and actual damage suffered by them."

George W. F. Wood, assistant quartermaster, certified "that in the spring of 1852 the said Black & Butt, in good faith, supposing said contract to be in full force, stated they were in readiness to transport any supplies for the said post that the quartermaster might deliver to them, but that I was authorized and otherwise instructed and ordered to transport the supplies for the post above mentioned by government teams; and that in consequence of said order the said Black & Butt have asked of me this certificate, in order to show the department the injury they have sustained by not being permitted to transport the stores, as they considered the contract required they should, and that they were in readiness to comply with the contract at the time of the arrival of the stores at Preston in the spring of 1852. *So stated by them.*"

I. If it be assumed that the above-mentioned *affidavits*, letters, and certificates are to be treated as evidence in this case, then they lead to the following conclusions:

1. That in the fall of 1851 Black & Butt received notice from the United States that thereafter they would not be required to transport army stores and baggage from Preston to Fort Belknap.

2. That the teams of Black & Butt were sold in the fall of 1851.

3. That it is not shown that Black & Butt were in readiness to transport army stores and baggage from Preston to Fort Belknap when they so stated to George W. F. Wood; and that though they were then informed that he had been instructed to make such transportation by government teams, yet they had received the same information in the fall of 1851.

4. That it does not appear that Black & Butt purchased any teams or wagons to enable them to execute their contract with the United States, or that they incurred any expense or trouble in the care of teams and wagons purchased by them and kept on hand through the winter of 1851-'52.

Hence it is plain that the second averment is not sustained even by this evidence.

II. But if the above-mentioned *affidavits*, letter, and certificate be inadmissible as evidence, then, there being no other evidence on file in this case relating thereto, the second averment is wholly unsupported.

3. As to the third averment:

The contract with T. G. Wright was for the transportation of army stores from Wright's Landing, on Red river, to Preston; and no part of the route was embraced by the contract with Messrs. Black & Butt. Their claim under this averment is wholly groundless.

4. As to the fourth averment:

It seems to us that the contract between Black & Butt and the United States was not broken by the United States, and that it has not been shown that Black & Butt were entitled to any greater sum of money than that which the petitioner acknowledges that they received. Captain Montgomery remained on duty at Fort Smith until the spring of 1854, and it was not until a short time previous to the 16th day of June, A. D. 1856, that he learned that Black & Butt had preferred this claim, or that they were dissatisfied with the action of the officers of the quartermaster's department under their contract.— (See letter of A. Montgomery to the Quartermaster General, dated June 16, A. D. 1856.)

Our opinion is, that the petitioner is not entitled to relief.

It is to be noted that the contract between the United States and the British Government, which was signed in 1894, provided that the United States should not supply arms to Mexico. This was a very important provision, and it was one of the reasons why the United States was able to maintain its position in Mexico. The contract was signed by the United States and the British Government, and it was one of the most important agreements of the time. It was a very important agreement, and it was one of the reasons why the United States was able to maintain its position in Mexico.

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JAMES KEARNEY.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of

JAMES KEARNEY *vs.* THE UNITED STATES.

1. The petition the of claimant.
2. Documents used as evidence, and referred to on the hearing, transmitted to the House of Representatives.
3. Claimant's argument, transmitted to the House of Representatives.
4. United States Solicitor's brief.
5. Opinion of the court, adverse to the claim.
6. Documents connected with the claim, but not used on the trial, are transmitted to the House of Representatives in a separate envelope.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said court, at Washington, this 5th day of December,
A. D. 1859.

SAMUEL H. HUNTINGTON.

Chief Clerk Court Claims.

IN THE COURT OF CLAIMS.

JAMES KEARNEY *vs.* THE UNITED STATES.

To the honorable Judges of the Court of Claims :

The petition of James Kearney, of the city of Georgetown, in the District of Columbia, respectfully represents : That he is a lieutenant-

colonel of the corps of topographical engineers in the army of the United States, and has been such since the 7th day of July, 1838; that he held the brevet rank of lieutenant colonel in said corps from the 29th of April, 1826, and has been an officer in the military service of the United States since the 18th of April, 1813; and during a large portion of said time he has been actively engaged in the field, and often, for long periods of time, at points distant from the seat of government; that not being informed of the changes made from time to time in the regulations of the department, and arising from the decisions in the courts of law, he omitted to make in his accounts the charges of various kinds to which he was, by the regulations of the department and by law, entitled.

Your petitioner now respectfully presents the following claims against the United States, which he believes to be legal and valid claims, based on principles which have been recognized by the several departments of the government in similar cases, and in accordance with the statutes of the United States and the regulations of the War Department, as he will show your honors on the trial of this cause, viz:

1. For the difference of pay and emoluments between a major and lieutenant colonel, from the 29th of April, 1826, to the 6th of July, 1838, inclusive; during which time he was in charge of and directing the operations of parties in the field at separate and distant places, his command being equal to that of a lieutenant colonel of his corps, performing similar services, and of equal responsibility, embracing as important and extensive duties as those of other officers of the same corps, amounting to \$3,084.

2. For double rations, under the regulations of the War Department in relation to such matters, from the 1st of November, 1832, to the 6th of July, 1838, amounting to \$625 40.

3. For forage as major, from the 1st of May, 1816, to the 30th of June, 1820, undrawn, for the number of horses to which he was entitled according to his rank, in pursuance of the laws and regulations of the army, amounting to \$1,424.

4. For his per diem allowance, in addition to the usual allowances for quarters and fuel, authorized by the regulation of the Secretary of War, sanctioned by the President of the United States, dated the 16th of July, 1836, while engaged upon extended lines of improvement, in connexion with the Eastern Shore railroad, in Maryland, and in North and South Carolina, from the 14th of April, 1836, to the 16th April, 1839, being 1,098 days, at \$1 50 per day, amounting to \$1,647.

5. For per diem allowance as a member of the board of internal improvement, under the orders of the War Department of the 15th of January and the 30th of June, 1830, in relation to the improvement of the Muscle Shoals, in Tennessee, and of the projected works and reports on the Pennsylvania and Ohio improvements, from the 30th of January, 1830, to the 14th of April, 1836, inclusive, being 2,266 days, at \$4 50 per day, \$10,197, subject to the proper deductions for amounts received within the periods specified, for quarters, fuel, per diem, and transportation, to be ascertained from accounts settled at the Treasury Department.

Your petitioner would further show that he is the sole owner of the foregoing claims, and has assigned no part of the same; and that the same have never been presented to Congress for their action; and that the claims for brevet pay, double rations, and forage, have been presented and disallowed at the department.

Your petitioner therefore asks your honors to inquire into the foregoing matters, and to grant him adequate relief in the premises.

JAMES KEARNEY.

BUREAU OF TOPOGRAPHICAL ENGINEERS,
Washington, June 11, 1851.

SIR: In reply to your letter of the 12th February last, requesting, as the agent of Lieutenant Colonel Jas. Kearney, to be furnished with a statement of his services "between the 29th April, 1826, and the 7th July, 1838, when he was made a full lieutenant colonel," I have to state, that, during the period referred to, he was in command of a party of engineers, and executed the following surveys, viz:

"In 1826, survey of a canal route from Pittsburg to Lake Erie, by the valleys of the Ohio river, Big Beaver, Shenango, and Conneaut creek to Elk creek; and the reconnoissance of a road to connect the Cumberland road with the Black Swamp roads in Ohio.

"In 1827, survey of two lines of canal in continuation of the French creek route by the Watterford Summit, to Lake Erie, and an embanchment of the Ohio and Erie canal from Elk creek to Presque Isle; survey of a canal route from the head of Big Beaver, by the valley of the Mahoning river, to the Akron summit of the Ohio State canal, and the survey of the Alleghany river and French creek.

"In 1828, survey of a canal route from the head of Big Beaver, by the valley of the Mahoning river, to the Akron summit of the Ohio State canal; survey of the Alleghany river with a view to its improvement for slack-water navigation; reconnoissance of a road from Uniontown, Pennsylvania, to Cleveland, on Lake Erie, and examination of a proposed route for a road from Hancock, Maryland, to the Pennsylvania turnpike.

"In 1829, survey with a view to the improvement of the navigation of the Tennessee river at the Muscle shoals, and Colbert's shoals; survey of the Tennessee river within the State of Alabama; location of a line of canal from near the head of Hurricane shoal, by the right bank of the Tennessee river, to Florence; and 'survey and levelling of the plane of the greatest depression of the plains of Courtland, from the mouth of Mallet's creek, to Town creek.'

"In 1830-'31, reconnoissance of the Sounds of North Carolina; military survey of St. Mary's river and its vicinity, in Maryland; survey of the Ohio, Beaver, and Shenango route of the Ohio and Erie canal from Pittsburgh to Elk creek, on Lake Erie, and to the harbor of Erie; survey of the Alleghany river from Pittsburg to French creek; of French creek to Le Boeuf; and of a route of a canal thence

to the harbor of Erie; survey of the Pennsylvania and Ohio canal from the Big Beaver river, to Akron, in Ohio; reconnoissance of roads in Pennsylvania and Ohio, with a view to the prolongation of the Cumberland road to Cleveland, and to the Black Swamp road.

"In 1832, preparing reports and maps of surveys executed in 1831; engaged upon the subject of the Potomac bridge under instructions from the Treasury Department, and in charge of the Bureau of Topographical Engineers from the 6th October, until the 27th December.

"In 1833, survey of the Potomac river within the District of Columbia.

"In 1834, survey with a view to the construction of a harbor at the entrance of Elk creek, Erie county, Pennsylvania; survey and location of a canal to connect the Waggamaw and Cape Fear rivers, in North Carolina, and location of that part of the Winchester and Harper's Ferry railroad which passes through the public grounds at Harper's Ferry.

"In 1835, survey of the Susquehanna river, and inspection of work done for the improvement of the navigation of the Tennessee river, in the vicinity of Florence, Alabama.

"In 1836, survey of a route for a railroad on the Eastern Shore of Maryland.

"In 1837, survey near the coasts of North and South Carolina.

"In 1838, preparing maps, charts, and report of his surveys near the coast of North Carolina, until the 7th July."

It is believed that the foregoing statement embraces all the field duties under the immediate supervision of Col. Kearney, within the time referred to.

Respectfully, sir, your obedient servant,

J. J. ABERT,

Colonel Corps Topographical Engineers.

R. BURGESS, Esq.,

Washington, D. C.

ADJUTANT GENERAL'S OFFICE,

Washington, February 26, 1859.

SIR: In compliance with the requisition of the Court of Claims, as communicated in your note of the 22d instant, I enclose herewith the commission of James Kearney, as brevet lieutenant colonel in the army of the United States. Of the other commission asked for, there is no further record in this office than that James Kearney was, on the 16th September, 1816, commissioned as a topographical engineer, (which gave him the brevet rank of major,) with rank as such from the 29th April, 1816.

I am, very respectfully, your obedient servant,

S. COOPER, *Adjutant General.*

JNO. D. McPHERSON, Esq.,

Deputy Solicitor Court Claims, Washington, D. C.

To all who shall see these presents, greeting :

And I do strictly charge and require all officers and soldiers under his command to obey and respect him accordingly; and he is to observe and follow such orders and directions, from time to time, as he shall receive from me, or the future President of the United States of America, and other officers set over him according to law, and the rules and discipline of war. This commission to continue in force during the pleasure of the President of the United States for the time being.

By the President :

ADJUTANT GENERAL'S OFFICE,
February 26, 1859.

S. COOPER, *Adjutant General.*

This is to certify that during the period of the within account, Brevet Lieut. Col. James Kearney directed the operations of surveying parties at the same time at separate and distinct places, as appears from the records of this office, namely, from the 29th April, 1826, to and inclusive of July 6, 1838; that his command for said time was equal to that of lieutenant colonel of the corps, performing similar services, of equal responsibilities, embracing important and extensive duties. His claim for brevet pay during that time, seems to me to come within established precedents in similar cases.

J. J. ABERT,
Colonel Corps Topographical Engineers.

The United States to Lieut. Col. James Kearney, Topographical Engineers, Dr.

The difference of pay between major and lieutenant colonel from April 29, 1826, to July 6, 1838, a term of service of 146 months 8 days, at \$15 per month..... \$2,194 00

Subsistence for myself from April 29, 1826, to July 6, 1838, 4,452 days, at one ration per day, making a total of 4,452 rations, at 20 cents per ration.....	890 50
Double rations, as commander, from November 1, 1832, to April 14, 1836, a term of 1,261 days, at one ration per day, making a total of 1,261 rations, at 20 cents per ra- tion.....	252 20
Double rations, as commander, from April 1, 1837, to July 6, 1838, a term of 462 days, at one ration per day, mak- ing a total of 462 rations, at 20 cents per ration.....	92 40
Double rations under regulations of War Department of September 1, 1832.	
	\$3,429 00

I hereby certify that the foregoing account is accurate and just ; that I have not received pay, nor drawn rations, forage or clothing in kind, or received money in lieu of any part thereof, for any part of the time therein charged ; and I actually owned and kept in service the horses, and employed the private servants for which I charge, for the whole of the time charged ; and that I did not, during the term so charged, or any part thereof, keep or employ as a waiter or servant a soldier from the line of the army ; that the annexed is an accurate description of my servant ; that for the whole period charged for my staff appointment, I actually and legally held the appointment, and did duty in the department ; that I was the actual and only commanding officer at the double ration post charged for ; and that no officer, within my knowledge, has a right to claim, or does claim, for said services, for any part of the period charged ; that for the whole time brevet pay is claimed, I was on duty, and had a command according to my brevet rank, agreeably to law and regulations ; and I was actually in the command of a company for the whole time additional pay is charged ; that I have not been in the performance of any staff duty for which I claim, or have received, extra compensation during the time an additional ration is charged for ; that I have been in the United States army as a commissioned officer for the number of years stated in the charge for extra ration ; and that I am not in arrears with the United States on any account whatsoever ; and that the last payment I received was from the paymaster.

JAMES KEARNEY,
Lieutenant Colonel Topographical Engineers.

I certify that from the 29th of April, 1826, to the 7th of July, 1838, viz : during the period mentioned in the within account, I held and exercised a separate and distinct command, and performed duties as important, extensive, and responsible as those of a lieutenant colonel of topographical engineers, and similar to them ; that the principles upon which the claim is founded are the same as those upon which were based the claim of Brevet Lieutenant Colonel J. J. Abert, topographical engineers, for brevet pay, as allowed by the Secretary of War, Mr. Bell, of Tennessee, and as the like claims of Brevet Majors

McNeill and Bache and Brevet Lieutenant Colonel S. H. Long, topographical engineers, allowed by the Secretary of War, Mr. Poinsett.

JAMES KEARNEY,
Lieutenant Colonel Topographical Engineers.

I certify that the representation of Lieutenant Colonel James Kearney, of his command during the time stated, is correct, and that, in conformity with decisions of the War Department in analogous cases, he is entitled to his brevet pay.

J. J. ABERT,
Colonel Corps Topographical Engineers.

General Macomb's compensation.—Brevet pay to General Macomb.

The nature and extent of General Macomb's command, taking into view the Military Academy at West Point, and the topographical engineers which are attached to his command, as chief of the corps of engineers, his brevet pay appears to be clearly within the meaning of the laws applicable to the case. The allowance of the pay of a brigadier to the assistant engineer, General Barnard, is an additional reason in favor of the allowance.

JAMES MONROE.

JUNE 12, 1822.

The brevet pay and emoluments of brigadier, will commence from the time that he was arranged to his present command. J. M.

TREASURY DEPARTMENT,
Third Comptroller's Office, October 3, 1854.

SIR: I have received your letter of yesterday's date, transmitting the papers connected with the claim of Lieutenant Colonel Jas. Kearney, for brevet pay, &c., from April 29, 1826 to July 1, 1838, amounting to \$3,429.

The highest military authority, the Secretary of War, having decided, in effect, on the 14th of January, 1851, that the claimant was not on duty with a command according to his brevet rank under the law of April, 1818,—concluding his remarks by an unqualified rejection of the claim; it would be indecorous, to say the least, for the accounting officers to review the decision of the military question with the intent to reverse it. In the justice of Secretary Conrad's decision, however, I entirely concur; and if I felt myself at liberty to act upon the claim on its legal merits, I should unquestionably arrive at the same conclusion.

The opinion of Colonel Abert, dated September 27, 1854, in favor of the validity of the claim, is entitled, as eminent professional authority, to high respect. But it cannot be held sufficient to reverse or annul the previous decision of his official superior, the head of the War Department, to whom, instead of to the accounting officers, it might appropriately have been presented.

All the papers in the case are herewith returned.

I am, very respectfully, yours,

J. M. BRODHEAD, *Comptroller.*

P. CLAYTON, Esq., *Second Auditor.*

TREASURY DEPARTMENT,
Second Comptroller's Office, October 3, 1854.

SIR: I have received your letter of yesterday's date, transmitting the papers connected with the claim of Lieutenant Col. Jas. Kearney, for brevet pay, &c., from April 29, 1826, to July 1, 1838, amounting to \$3,429.

The highest military authority, the Secretary of War, having decided, in effect, on the 14th of January, 1851, that the claimant was not on duty with a command according to his brevet rank under the law of April, 1818,—concluding his remarks by an unqualified rejection of the claim; it would be indecorous, to say the least, for the accounting officers to review the decision of the military question with the intent to reverse it. In the justice of Secretary Conrad's decision, however, I entirely concur; and if I felt myself at liberty to act upon the claim on its legal merits, I should unquestionably arrive at the same conclusion.

The opinion of Colonel Abert, dated September 27, 1854, in favor of the validity of the claim, is entitled, as eminent professional authority, to high respect. But it cannot be held sufficient to reverse or annul the previous decision of his official superior, the head of the War Department, to whom, instead of to the accounting officers, it might appropriately have been presented.

All the papers in the case are herewith returned.

I am, very respectfully, yours,

J. M. BRODHEAD, *Comptroller.*

P. CLAYTON, Esq., *Second Auditor.*

TREASURY DEPARTMENT,
Second Auditor's Office, October 3, 1818.

SIR: In reference to your claim for brevet pay, I would respectfully enclose herewith the decision of the Second Comptroller, dated the 3d instant, affirming my decision of the 2d instant, which was a rejection of the claim.

Very respectfully, your obedient servant,

P. CLAYTON, *Second Auditor.*

Col. JAMES KEARNEY,

Topographical Engineer.

WASHINGTON, November 21, 1854.

SIR: In November, 1850, I presented to the accounting officers of the Treasury department, through my agent, Mr. R. Burgess, a claim for the difference between the pay of major of topographical engineers and that of brevet lieutenant colonel from 1826 to 1838. The case was set forth in the letter of Mr. Burgess of November 9,

1850, and thereupon the Second Auditor decided that "there is no law authorizing the *accounting officers* to allow the claim." On the 13th of the same month my agent appealed from this decision, giving as his reason for so doing that the opinion of the Auditor that "there is no law authorizing the accounting officers to allow the claim" would seem to imply the reference of the case to the Secretary, or otherwise that the Secretary's predecessors in office had allowed the claims referred to by the agent without authority of law. The case thus coming before the Secretary, the Hon. Mr. Conrad, he came to the following decision :

"WAR DEPARTMENT, *January 14, 1854.*

"Owing to the nature of the duties of topographical officers their claims for brevet pay under the act of 1818 must always present questions of difficulty. In the present case I see nothing to show that the duties of Lieutenant Colonel Kearney were not as appropriate to the rank of major as to that of lieutenant colonel. The application is rejected."

Following this action of the War Department, and upon the suggestion should have been referred to the colonel of the corps of topographical engineers for his statement of the services rendered and of the duties performed, the account was forwarded to the chief of topographical engineers, who certified to those services in the following words: .

BUREAU TOPOGRAPHICAL ENGINEERS,
September 27, 1854.

"This is to certify that during the period of the within account Brevet Lieutenant Colonel James Kearney directed the operations of surveying parties at the same time at separate and distinct places, as appears from the records of this office, namely from the 29th April, 1826, to and inclusive 6th July, 1838, that his command for said time was equal to that of lieutenant colonel of the corps, performing similar services of equal responsibilities, embracing important and extensive duties. His claim for brevet pay during that time seems to me to come within established precedents in similar cases.

"J. J. ABERT,
"*Colonel Corps Topographical Engineers.*"

In the opinion of my agent, a gentleman of great experience in questions of this kind, the preceding certificate brought the claim within the previous decisions of the War Department, and supplied the facts which were alone wanting to satisfy the Hon. Mr. Conrad of its soundness; and it seemed to him probable also that it brought the case within the official competency of the accounting officers. Under his advice, therefore, the case was again laid before the accounting officers, who, on its first presentation, had not hesitated to take the initiatory steps in the case. But it seems, according to them, that in the present state of the case, it ought to have been brought before "the head of the War Department, to whom instead of the accounting officers it ought to have appropriately been presented. In not adopt-

ing that course, it seems I have manifestly erred, and it behoves me, therefore, to retrace my steps, and I do so with no small satisfaction, being persuaded that the private and unofficial opinions of the accounting officers intruded into my case will not have the effect to prejudice it, or prevent an examination of the ground on which it is presumed to rest, or the reasoning in its favor contained in the memorandum which accompanies this communication, and the cases supposed to be in point which are set forth in the printed document herewith, viz: Doc. H. R. No. 263, 27th Congress, 2d session, pp. 5 to 18 inclusive, and in Doc. 8. 25th Congress, 2d session.

The additional evidence now produced, namely, the certificate of the chief of the bureau of topographical engineers, is very important to the case, and was entitled to respect if the case had been within the competency of the accounting officers, not because it announced opinions favorable to this claim, or because of the eminent professional authority of Colonel Abert, but because the certificate set forth important facts, and had received the proper and customary authentication. The idea that the eminent professional authority of any one could "be held sufficient to reverse or annul the previous decision of his official superior, the head of the War Department," I am sure could never enter the mind of any sensible person. Any error of that kind I hope may not be attributed to the claimant in this case.

It is said that, according to Mr. Conrad, "the claimant was not on duty with a command according to his brevet rank, under the law of April, 1818." While contesting this version of Mr. Conrad's opinion I must say that I do not claim brevet pay under the naked act of 1818. It is very certain, as set forth in the opinions of the Attorney General, that under this law alone no officer whatever could be on duty with a command according to his brevet rank so as to entitle him to brevet pay, because the law does not say what shall constitute a command according to brevet rank, but leaves that point to be settled by the Executive, in virtue of his authority as President of the United States. My claim is founded upon the act of 1818, explained by subsequent enactment, regulation, and authoritative practice, as shown in the memorandum accompanying this letter.

A copy of the letter of the Second Comptroller of the Treasury, declining to act officially in the case, is enclosed herewith, and I have very respectfully to request that the other papers connected with it may be laid before you by the Second Auditor.

Respectfully, I have the honor to be, sir, your obedient servant,
JAMES KEARNEY.

The Hon. JEFFERSON DAVIS,
Secretary of War.

TREASURY DEPARTMENT,
Second Auditor's Office, April 26, 1851.

SIR: In reply to your letter received this morning, I beg leave to inform you the Secretary of War has decided in the case of Lieutenant Colonel James Kearney, and if you desire a re-examination of the case you should address the Secretary on the subject.

A proper respect for the views of the Secretary of War forbids me referring the claim to Colonel Abert.

Very respectfully, your obedient servant,

P. CLAYTON, *Second Auditor.*

R. BURGESS, Esq.,

City of Washington, D. C.

WASHINGTON, D. C., *April 25, 1857.*

SIR: The Secretary of War, in his decision upon the claim of Lieutenant Colonel James Kearney for brevet pay, &c., remarks that, "I see nothing to show that the duties of Lieutenant Colonel Kearney were not as appropriate to the rank of major as that of lieutenant colonel;" and it being suggested to me by Colonel Abert, the chief of the topographical corps, that the claim should have been referred to him, I have, therefore, respectfully to request that the account of Lieutenant Colonel Kearney be transmitted to that Bureau with the view of obtaining the evidence which the Secretary of War deems to be important in the case.

Very respectfully, your obedient servant,

R. BURGESS.

P. CLAYTON, Esq., *Second Auditor.*

TREASURY DEPARTMENT,

Second Auditor's Office, January 17, 1851.

SIR: I have to inform you that Lieutenant Colonel James Kearney's claim for difference of pay, &c., between major and lieutenant colonel of corps of topographical engineers, from April 29, 1826, to July 7, 1838, reported to the Secretary of War by this office, on an appeal from you, has been returned to this office, rejected by the Secretary, and my decision sustained.

Very respectfully, your obedient servant,

P. CLAYTON, *Second Auditor.*

R. BURGESS, Esq., *Washington City, D. C.*

WASHINGTON, D. C., *November 13, 1850.*

SIR: I have the honor to enclose a letter of this date from the Second Auditor of the Treasury, in reference to a claim of Lieutenant Colonel James Kearney, of the corps of topographical engineers, the particulars of which are therein fully set forth. From the decision of the Auditor, (as the agent and attorney of Colonel Kearney,) I take leave to appeal to you. The remark in the Auditor's letter, "that there is no law authorizing the accounting officers to allow the claim," would seem to imply a reference of the case to you; or otherwise, that your predecessors in office had allowed the claims referred to *without*

the authority of law. From that decision I appeal. The grounds of Colonel Kearney's claim are fully stated in my letter to the auditor of the 9th instant, and I have to request that you cause the decisions there referred to to be laid before you. In addition, I will remark that, throughout the whole range of the opinions of the Attorneys General, the principle is adopted that where a *practice* has prevailed in the department, it would be unsafe and unwise to depart therefrom, when such departure would operate to the prejudice of any particular officer or citizen. This rule until recently has always been observed.

I have the honor to be, most respectfully, your obedient servant,
 RICHARD BURGESS.

Hon. C. M. CONRAD,
Secretary of War.

P. S.—When this case comes up for decision, I respectfully request to be allowed an interview on the subject.

WASHINGTON, D. C., November 9, 1850.

SIR: I enclose an account of Lieutenant Colonel James Kearney, of the corps of topographical engineers, for difference of pay between major and brevet lieutenant colonel, from 1826 to 1838, amounting to \$3,084 18, for your official action thereon.

Lieutenant Colonel Kearney claims this allowance in accordance with decisions in numerous analogous cases, upon which payments have been made, the evidence of which will be found on the files of your office; those recollected, and to which reference is specially requested, are—

1. General A. Macomb, corps of engineers, allowed by the Secretary of War in pursuance of a decision by President Monroe.

2. Colonel J. J. Abert, corps of topographical engineers, allowed by the Hon. John Bell, Secretary of War.

3. Major Wm. G. McNeill, corps of topographical engineers, allowed by the Hon. J. R. Poinsett, Secretary of War.

4. Major H. Bache, corps of topographical engineers, allowed by the Hon. J. R. Poinsett, Secretary of War.

5. Lieutenant Colonel S. H. Long, corps of topographical engineers, to whom it is believed, though not distinctly recollected, that a similar allowance was made.

6. General George Gibson, allowed by Mr. Poinsett, and to many others whose names I do not recollect, and have not now the means of ascertaining.

Lieutenant Colonel Kearney had a like command, and performed like duties, and had equal responsibilities with Colonel Abert. Major McNeill, Major Bache, and Lieutenant Colonel Long, all officers of the same corps, engaged on similar service, and about the same time.

The decisions and allowances in these cases are deemed to have established the *practice*, and according to the rule laid down by Mr. Attorney General Wirt, at page 594 of the volume of opinions of the Attorneys General, that if there had been a practice introduced on the subject, it would be unjust to change it to another officer's pre-

judice; this rule applies with great force to Lieutenant Colonel Kearney's case, and he submits his claim with the full conviction of its merit, and under the expectation that the same measure of justice will be meted to him that has been accorded to the senior and junior officers of his corps who performed like services to himself.

I am, sir, your obedient servant,

RICHARD BURGESS,

Attorney of Lieutenant Colonel Kearney.

P. CLAYTON, Esq., *Second Auditor.*

WASHINGTON, *September 28, 1854.*

SIR: In reference to my account for brevet pay as lieutenant colonel from 1826 to 1838, submitted to your office on the 9th November, 1850, by my agent, Richard Burgess, esq., to whose letter of that date I beg leave to call your attention, the Secretary of War, in his decision of the 14th January, 1851, states that "in the present case I see nothing to show that the duties of Lieutenant Colonel Kearney were not as appropriate to the rank of major as to that of lieutenant colonel." I have now the honor to present a new account, with the certificate of the chief of my corps, showing that my duties were appropriate to my brevet rank as required by the decision of the Secretary above quoted.

In the event of your decision being adverse to my claim as now presented, I have to request that it be reported to the Second Comptroller of the Treasury, with your reasons for its disallowance, accompanied by the papers and letters pertaining to the case, for his decision thereon.

I am, very respectfully, your obedient servant,

JAMES KEARNEY,

Lieutenant Colonel Topographical Engineers.

P. CLAYTON, Esq., *Second Auditor.*

WAR DEPARTMENT,

Washington, May 5, 1855.

SIR: I have considered your claim for brevet pay, presented on the 25th November last, and transmit you a copy of my decision thereon, as follows:

"I do not see that the duty performed by Lieutenant Colonel Kearney was according to his brevet rank, nor had he that military command which is necessary, in the view of this Department, to entitle an officer to brevet pay."

Very respectfully, your obedient servant,

JEFF. DAVIS,

Secretary of War.

Lieut. Col. JAMES KEARNEY,

Corps of Topographical Engineers, Washington.

NOVEMBER 21, 1854.

Memorandum to accompany Lieutenant Colonel J. Kearny's claim for brevet pay.

The first act of Congress upon the subject of brevet pay is that of July, 1812, authorizing the President to confer brevet rank, but providing that officers brevetted shall not be entitled "to any additional pay and emoluments, except *when commanding separate posts, districts, or detachments.*"

The next act concerning brevet pay, is that of April 16, 1818, still in force, which provides that the officers shall "receive the pay and emoluments of their brevet rank when *on duty*, and having a *command according to their brevet rank*, and at no other time.

According to the opinion of Mr. Attorney General Berrien, (July 18, 1829,) the effect of the act of 1818, is to restrict that of 1812, and also to enlarge its provisions. The act of 1812, he says, gave brevet pay *only* to officers having the chief command of *separate posts, districts, or detachments*, while the act of 1818, dispenses with this requisition, and extends the allowance to all brevet officers *on duty*, and having a *command according to their brevet rank*. "It is the fact of *having the command of a separate post*, which gives the brevet pay under the act of 1812. It is the fact of the *aptitude of the command to the brevet rank of the officer*, which gives it under the act of 1818."

But the law relating to brevet pay stops with saying that an officer shall have brevet pay only when he commands according to his brevet rank. What constitutes a command according to brevet rank the law does not decide; it leaves that question wholly open." Such is the language of the law officers of the government.

But Mr. Wirt, in the case of General Macomb, (opinions of the Attorneys General, page 410,) says, in relation to this omission respecting command: "In the silence of the law, I suppose it to have been always perfectly competent to the President of the United States to declare by his own orders what should be a *command, according to brevet rank*;" and again he says, "I presume it was the exercise of this power that the order of the 8th of May, 1818, explanatory of the act of April 16, 1818, was passed."

Now, the order of the 8th of May, 1818, relating to brevets was manifestly intended only to act upon the line of the army, and the regulations of 1820, supplemental to this, made provision for the line also in cases which appear not to have been contemplated by the order of 1818, leaving still another class of cases requiring the intervention of the President in explanation of the act of 1818, as to what should constitute a *command according to brevet rank*. The class of cases now referred to, came up for consideration under the opinion of Mr. Wirt, in the case of General Macomb, then chief engineer, June 5, 1822.

Mr. Monroe, Mr. Calhoun being Secretary of War, issued the order, a copy of which accompanies this communication. (No. 8.) At the period now referred to, General Macomb held by commission, as chief engineer, the rank of colonel in his corps, and he held likewise the

brevet rank of brigadier general. He was by law inspector of the Military Academy, one of the functions of his office of chief engineer. Also, in virtue of his office of chief engineer he was in command of his corps. It is not averred, however, that in virtue of these General Macomb was on duty, and had a command according to his brevet rank. But there had been added to his command, by the order of the President, the then department of topographical engineers, consisting of some ten officers, without troops. There does not appear to have been under his command an organized military force numerically equal to a brigade. But his range of duties had acquired an extent, variety, and importance that placed his command, in the estimation of the President of the United States, upon an equality with the command of a brigadier general, and therefore he directed that he should receive the pay and emoluments corresponding with his brevet rank of brigadier general. I do not know that the wisdom of this decision has been questioned; its legality cannot be. The law had omitted, *perhaps from the impracticability of the task*, to define what should constitute the command, and according with the brevet rank of officers, and as has already been said, it necessarily devolved upon the President of the United States, in virtue of his authority as President, to supply this omission by defining what should constitute that command, in each case, or in each class of cases, as they presented themselves.

Manifestly this decision or order of Mr. Monroe enlarges the boundary of command of brevet officers beyond those indicated in the regulations of 1818 and 1820. The President, in the exercise of his unquestionable right to declare what should be a command according to brevet rank, having extended the provisions of the act of 1818 to the chief engineer, and Congress having afterwards (March 3, 1839, 5 Stat. 352) declared that the act of 1818 should be *so construed* as to include the case of the adjutant general, the principle appears to have been admitted that brevet officers not in command of military bodies nor of a numerical force, might nevertheless have a command equal to their brevet rank.

Under the rule thus given by the highest authority known to the law, and in conformity with the principle of construction prescribed by the law-making power, there arose, from time to time, cases tending to settle, with more and more certainty, the rule concerning brevet pay. Some of these cases were referred to by my agent, Mr. Burgess, in his letter of November 9th, 1850, setting forth my claim for the difference of pay of major and brevet lieutenant and colonel. A more extended list of such cases will be found in the printed document No. 263, H. R. 27 Cong., 2d Sess.—a document to which I have to request the very particular attention of the department, and especially from page 5 to page 18 inclusive. Many of these cases, or at least seventeen of them, would also seem to settle the principle, that to constitute a command according to his brevet rank, and to entitle him to brevet pay, it is not necessary, under the act of 1818, that an officer's command should consist of an organized military force, or that a numerical command of any description is necessary in order that an officer's command shall be according to his brevet rank.

With respect to the decisions in these cases, I should suppose that they are of equal weight with that in the case of the chief engineer, General Macomb, which proceeded directly from the President; that they are to be received as the decisions of the President, or decisions under sanction of his authority, and therefore to be received as precedents in like cases. These decisions, in so many cases, extending over a long period of time and occurring during various administrations of the War Department, countenanced also by the action of Congress in at least the case of the adjutant general, would seem to have established the practice of the government under the several acts concerning brevet pay, and it would seem to be unjust, as it is said by Mr. Wirt, in the case of General Worth, if there has been a practice introduced on a subject, to change it to an officer's prejudice. Such does not appear to have been the object or intention of the Hon. Mr. Conrad, in the decision in the case of Lieutenant Colonel Kearney, in 1851. In that decision he says: "In the present case I see nothing to show that Lieutenant Colonel Kearney's duties were not as appropriate to the rank of major as to that of lieutenant colonel, and this appears to have been the only objection that occurred to him with reference to the case, viz: a defect in the testimony—the evidence being insufficient to bring the case within the established practice of the department. Amongst the papers before him there was nothing to show that the duties of Lieutenant Colonel Kearney were not as appropriate to the rank of major as to that of lieutenant colonel. This defect appears now to be remedied by the certificate of Colonel Abert, the chief of the Topographical Bureau, presented to the accounting officers of the Treasury, with my letter of September 28, 1854.

The case of Brevet Brigadier General Macomb, when chief engineer, has been already mentioned. There is another case in which this officer was concerned, namely, his claim for the pay and emoluments of his brevet rank of major general while he was brigadier general in command of the 5th military department. The case is set forth in the printed document H. R. No. 8, 25 Cong. 2 Sess. While upon the frontier, the general not knowing that under the act of 1818, he was entitled to his pay of major general, because of his command of a military district, he did not draw it; but on coming to the seat of government in 1821, he discovered that Generals Scott, Gaines, and, afterwards, General Ripley, who were also brigadier generals with the brevets of major general, did, under the law of 1818, draw their brevet pay.

This claim stood upon the ground that the general's command had been "*equal to that of any other of the brevet major generals.*" The case came before the Committee of Claims of the House of Representatives, which committee determined by their report that the same should be referred to the Secretary of War, with directions to settle the accounts "*on the same principles that the accounts of similarly situated officers had been settled,*" and accordingly the account was duly audited, allowed, and passed, and upon the ground of precedent alone.

All which is respectfully submitted.

JAMES KEARNEY.

Hon. JEFFERSON DAVIS,
Secretary of War.

Amongst the printed army regulations of 1841 are the following, which may be supposed to bear upon the case of Brevet Lieutenant Colonel Kearney :

Regulation 1,255.

“Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments, when on duty, and having a command according to their brevet rank, as follows: ‘7. A brevet officer when assigned by the Secretary of War to a particular duty and command, according to his brevet rank, although such command be not in the line, provided his brevet allowances are recognized in the order of assignment.’ ”

The law declares explicitly that brevet officers shall be entitled to and receive the pay and emoluments of their brevet rank. The preceding regulation adds to the provisions of the law conditions unknown to the law and incompatible with it. One of these conditions is, that the officer be assigned to a particular duty and command “by the order of the Secretary of War;” and another condition is, that his brevet allowances “be recognized in the order of assignment.”

The power to determine what shall constitute a command, according to brevet rank, in every case or in every class of cases, is not questioned. In the absence of legislation it exists in the Executive, and it has not unfrequently been exercised in the establishment of general regulations and in specific decisions in particular cases, as they occur. But I respectfully conceive that such regulations and decisions should be in harmony, and not in conflict, with the law.

There can be no question that, the law having left open and undetermined the question, what shall constitute a command according to brevet rank, the Executive has the power to say what shall constitute such a command. Having determined that point, however, the officer's title to the pay and emoluments of his rank necessarily and unavoidably follows; and the further conditions imposed by the regulations are to the manifest prejudice of his title to his pay and emoluments.

Probably the object and purpose of the regulation in question was to prevent the assignment of brevet officers to duties and commands, *other than those in the line*, by any authority inferior to that of the Secretary of War, and if so it was a very legitimate purpose, and a fit subject of regulation. But it might have been attained without violence to the law. To a regulation or order forbidding the exercise of the authority in question by any functionary inferior to the Secretary, there could be no legal or reasonable objection. Under such an order the penalty of disobedience might very properly be made to attach to the transgressor. Under the regulation we are now reviewing, the penalty attaches to the innocent. According to the military law, every officer must obey the orders of his superior. Nevertheless, for so doing, the regulation visits him with the forfeiture of the pay and emoluments which the law declares he *shall be entitled to and receive* when on duty and having a command according to his brevet rank.

The purpose of regulation 1255 is to declare what shall constitute a command according to the brevet rank of an officer. This, however,

the regulation fails to do in the case of officers having a command *not in the line*. The regulation declares that officers having brevet commissions shall be entitled to their brevet pay and emoluments, when assigned by order of the Secretary of War to a particular duty and command, according to his brevet rank, but it does not declare what it is that constitutes a particular duty and command *not in the line*. That definition is still concealed in the silence of the law, and the succeeding proviso of the regulation, namely, that his brevet allowances be recognized in the order of assignment does not disclose it. Hence, we are forced to seek for a definition *in the specific decisions in particular cases* to which reference has been already made in this memorandum.

But assuming, for a moment, the validity of the restrictions imposed by regulation 1255, page 7, and that an officer cannot have a command according to his brevet rank *so as to entitle to his pay and emoluments*, unless he be assigned to duty by the Secretary of War, it may be replied that we have sufficient evidence of the Secretary of War's action when we have an order of a Bureau of the War Department assigning an officer to a particular station or command. Orders proceeding from the Adjutant General's office, for example, have all the authority and effect of orders coming directly from the Secretary, because in fact, or by legitimate presumption, they have the sanction of the Secretary; and so it may be said of any other of the bureaus of the War Department, charged with administrative duties.

In the year 1825 the present claimant was assigned to duties connected with various engineering projects, in which the government took an interest, and he continued upon these, as well as other duties, until his promotion to the lieutenant colonelcy of his corps in 1838. The orders assigning him to these duties and his instructions (multiplied and varied from time) reached him always by the channels of communication through which the Secretary of War makes known the will of the department to those who are serving under it. Hence, it may be safely averred that the claimant was assigned to the duties with which he was occupied during the above-mentioned period, by the orders of the Secretary of War.

But the claimant's brevet pay and allowances *are not recognized in the orders of assignment*. I believe they rarely or never were, notwithstanding the regulation. Nevertheless it would seem that the claimant is debarred his brevet pay and emoluments, although on duty, and having a command according to his brevet rank.

The law and regulation being thus in conflict with each other, is there any question as to which of them should prevail?

In conclusion, it may not be amiss to say that some of the most important of the assignments referred to in this case proceeded in fact from the President—General Jackson.

JAMES KEARNEY.

NOVEMBER 25, 1854.

WAR DEPARTMENT, *May 3, 1855.*

I do not see that the duty performed by Lieutenant Colonel Kearney was according to his brevet rank, nor had he that military command which is necessary, in the view of this department, to entitle an officer to brevet pay.

JEFFERSON DAVIS,
Secretary of War.

ADJUTANT GENERAL'S OFFICE,
November 21, 1830.

When was Colonel Kearney, corps of topographical engineers, brevetted as lieutenant colonel from April 29, 1826? *i. e.* what was the date of the resolution?

Brevet Major James Kearney, topographical engineers, was confirmed by the Senate, February 22, 1827, as lieutenant colonel by brevet, to date from April 29, 1826. July 7, 1838, being then a lieutenant colonel by brevet, he was appointed the lieutenant colonel of his corps, which was reorganized and increased by the act of July 5, 1838, section 4th.

L. THOMAS,
Assistant Adjutant General.

DR. *The United States to James Kearney Lieut. Col. Corps Topographical Engineers.*

For double rations from November 1, 1832, to July 6, 1838, under the regulations of the War Department, in relation thereto, as stated in No. 1 and No. 3, amounting to \$625 40.

MAY 1856.

JAMES KEARNEY.

REGULATIONS.

DEPARTMENT OF WAR, *September 1, 1832.*

Each officer of the corps of topographical engineers, charged with the construction of any work, or having a separate command, shall hereafter be entitled to receive double rations, in the same manner as is allowed to officers of other arms of service commanding separate forts or arsenals.

JOHN ROBB,
Acting Secretary of War.

No. 5.

DEPARTMENT OF WAR, *June 4, 1822.*

In the absence of chiefs of staff bureaus, the allowance of double rations will devolve on the officer having charge of the same.

J. C. C.

(No. 7.)

DEPARTMENT OF WAR, *August 1, 1828.*

Each officer of the corps of engineers charged with the construction of a fortification, or having a separate command, shall hereafter be entitled to receive double rations, in the same manner as is allowed to officers of other arms of the service commanding separate posts or arsenals.

P. B. PORTER.

No. 9.

DEPARTMENT OF WAR, *September 1, 1832.*

Each officer of the Corps of Topographical Engineers, charged with the construction of any work, or having a separate command, shall hereafter be entitled to receive double rations, in the same manner as is allowed to officers of other arms of the service commanding separate posts and arsenals.

JOHN ROBB,
Acting Secretary of War.

No. 17.

Mr. Poinsett's decision respecting regulations, September 1, 1832, (No. 9), Major Turnbull's case, July 21, 1837.

No. 18.

Mr. Poinsett's decision respecting Major Whiting's case under same regulation as Turnbull's: this opinion of Mr. Poinsett is dated August 21, 1837.

There can be no doubt that under regulations of September 1832, Lieutenant Colonel Kearney was entitled to double rations for his separate command as chief engineer E. S. R. R. The doubt would be respecting its application to a private work, and it is this doubt that Mr. Poinsett's opinions of July 21, 1837, (No. 17,) and August 21, 1837, settles upon general principles, which apply equally to all similar cases, as to the cases before him. If any decisions can possibly *settle a principle* those decisions settle it.

J. K.

Paragraph 12, Article 48 General Regulations of 1836. In these regulations there is this language. "The requisite authority for the allowance of *additional rations* to the engineers and topographical engineers, will be the order of the Secretary of War to the Paymaster General, communicated through the Adjutant General."

In paragraph 1251, General Regulations 1841. Is there such a condition; and, if not, when was it dropped? Was it ever applied in practice? The Paymaster General can answer these questions.

J. K.

WASHINGTON, *May* 30, 1815.

SIR: The accompanying account and papers are referred to you at the suggestion of Major Denny, of the pay department, who thinks that such a course will facilitate the investigation of them. They relate to certain allowances for forage and for double rations due to me by the United States.

Respectfully, sir, your obedient servant,

JAMES KEARNY,

Lieut. Col. Topographical Engineers.

TO THE SECOND COMPTROLLER,
of the Treasury.

Dr. The United States to Major James Kearney, Top. Engineers.

Forage for four horses from the 1st of May, 1816, to the 31st of July, 1819, 39 months, at \$32 per month, \$1,248.

Forage for two horses from the 1st of August, 1819, to the 30th of June, 1820, 11 months, at \$16 per month, \$176.

Double rations, commanding, from the 15th of April, 1836, to the 31st of March, 1837, 351 days, at 4 rations per day; total rations, 1,404; place where due, Washington; at 20 cts. per ration; \$280 80. Railroad on the eastern shore of Maryland; also, office of topographical engineers, Washington. Total, \$1,704 80.

TOPOGRAPHICAL BUREAU, *November* 3, 1831.

SIR: I have the honor to bring to your consideration a claim which I conceive to be possessed by topographical engineers, for double rations, when in the exercise of separate commands.

This claim embraces two objects—

1st. Double rations to all officers of the topographical engineers when in the exercise of separate commands.

2d. Double rations to the officer at the head of the bureau at Washington.

The first is now allowed to officers of every branch of the army, under the law of the 16th of March, 1802, which gives to the President the power of allowing an increased number of rations. The military committee in a report, (No. 47, vol. 1 of 1829-'30,) remark that "the discretionary power of increasing rations was vested in the President, that he might exercise it when commanding officers were stationed where provisions were dear, or where from their situations they were frequently called upon to exercise the expenses of hospitality." Now, there is no situation in which an officer can be placed so

much exposed to the expenses of hospitality as that of an officer on topographical duty. His duties being always highly acceptable to the inhabitants of the localities in which he operates, he is subject to frequent calls of numbers, and his residence being generally at a public house, the tax which these visits lay upon him in exercising the usual and expected courtesies of society becomes a serious burden, and offers one of the most marked occasions for the exercise of the discretion bestowed upon the Executive by the law. I may also add that an officer on topographical duty, from the frequent changes of quarters, made necessary by the very nature of his duties, is continually exposed to the highest charges of living, and cannot pursue any system of economy in this respect but at the expense of his duties.

The allowance of double rations is now bestowed upon officers of the engineer corps when on topographical duty and commanding, and has been drawn by them when operating in the same States as topographical engineers, and when similarly situated, thus showing a singular example of partiality, or of neglect, or of indifference to the rights of topographical engineers. (See the copy of the regulation herewith enclosed.)

The second object of this letter, double rations to the chief of the topographical bureau, might be considered as embraced in the statement of the first, as he has also a separate command; but I preferred bringing it distinctly to your view.

The allowance is now made to the head of every bureau except this, and constitute the precedents upon which I rely for the claim, and for the practice of the Executive under the law. Doubts were at one time entertained of the propriety of these allowances, and the subject was brought to the consideration of Congress. The committee to whom it was referred made upon it the following report:

“3dly. Officers at the head of bureaus, &c., (see rep. 47, vol. 1, 1829-’30.) It has been questioned whether the President be legally authorized to direct double rations to be issued to officers at the heads of bureaus connected with the Department of War. By the fifth section of the act of March 15, 1802, there is given to every officer in the army a certain number of rations daily, and ‘to the commanding officers of each separate post such additional number of rations as the President of the United States shall from time to time direct, having respect to the special circumstances of each post.’ It has been intimated that bureau officers do not come within the provisions of this act, as their bureaus are not posts. It seems to the committee that such officers are comprehended both within the letter and the spirit of the meaning of the law. An officer is at his post when he is at that place, whether it be in a city or in a camp, which is assigned to him by his superior; and when there, if he have under his separate orders a regiment or a bureau, he is equally the commanding officer of a separate post; that is, in the meaning of the law, he exercises a separate and distinct command.

“The discretionary power of increasing rations was vested in the President, that he might exercise it when commanding officers were stationed where provisions were dear, or where, from their situation, they were frequently called upon to incur the expenses of hospitality.

It must be obvious that these reasons are as applicable to an officer superintending a bureau at Washington, as to one commanding a regiment or a fortress upon the sea coast or in the interior of the country."

To this clear and conclusive exposition of the reasoning of the case I have nothing to add, except that my own experience has proved to me that the chief of this bureau is a post in favor of which the discretionary power of the law may be justifiably exercised, under the reasons of the law.

I have the honor to be, very respectfully, sir, your obedient servant.

JOHN J. ABERT,

Lieutenant Colonel Topographical Engineers.

Hon. LEWIS CASS,

Secretary of War.

ADJUTANT GENERAL'S OFFICE,
Washington, March 22, 1859.

DEAR SIR: In answer to your inquiry of this morning, I have the honor to state that it appears upon examination that the regulation of the War Department, dated September 1, 1832, allowing double rations to officers of the corps of topographical engineers under certain circumstances, continued in force, except so far as modified by the regulation of May 28, 1842, (copy herewith,) until abrogated by the sixth section of the act of August 23, 1842.

The report left with me is respectfully returned, as requested.

I am, sir, very respectfully, your obedient servant,

S. COOPER,
Adjutant General.

Hon. ISAAC BLACKFORD,

Court of Claims, U. S., Washington, D. C.

WAR DEPARTMENT,
Adjutant General's Office, Washington, May 28, 1842.

[General Orders.—No. 29.]

The following regulation is published for the government of the army.

WAR DEPARTMENT, *May 23, 1842.*

Numerous applications for additional rations having been made, the attention of the department has for some time been called to the subject, and it has received the most careful and deliberate consideration. The interest of the country and the welfare of the service alike require that the system, which has so long prevailed, of extending the allowance of double rations from one case to another, instead of recurring to the original intent of the law, should cease. So far as that intent can be ascertained from the nature of the provision and the terms of the law, it is the design of the department

strictly to adhere to it. This is rendered the more necessary in consequence of the precedents having become anomalous, and apparently conflicting. The equitable principle of putting on the same footing all officers who may appear to render similar services, or who are equally meritorious, where a rigid administration of the law may produce an inequality between them, is one that addresses itself rather to the legislature than to the executive.

Upon recurring to the authority for granting additional rations, it is found that there are but two laws bearing upon the subject. The act of March 16, 1802, authorized the allowance "to the commanding officers of each separate post," and has never been modified, except by the act of April 24, 1816, which recognized and adopted the regulations in force prior to the reduction of the army. By various regulations, previous to the passage of that act, the allowance of double rations had been extended to officers in command of separate armies and of geographical military districts or departments, and to engineer officers superintending the construction or repair of fortifications. With a view to conform to the principle of the act of 1802, as thus modified, and to apply it to new descriptions of duties clearly within it, paragraphs 1251 and 1252, of article 80 of the "general regulations of the army," and all other regulations and orders upon the subject, except paragraphs 1,253 and 1,254 of the same article, are hereby rescinded, and the following is substituted, to take effect on the first day of June next:

To the following officers, and no others, there will be allowed double rations:

1. To the major general commanding the army, and to every officer commanding-in-chief a separate army, actually in the field.

2. To the generals commanding the eastern and western geographical divisions.

3. To the colonels or other officers commanding military geographical departments.

4. To the commandant of each permanent or fixed post, garrisoned with troops, including the superintendent of the Military Academy at West Point, who is regarded as the commandant of that post.

5. To the commandant of each of the armories and of each arsenal of construction at which the operations appropriate to such arsenals are actually carried on.

6. To the officers of the corps of engineers and topographical engineers having the immediate command of the the men engaged in the construction of fortifications or other military works, or in the improvement of harbors or rivers, but not to include any superintendent other than the officer having such immediate command.

J. C. SPENSER.

By order:

R. JONES, *Adjutant General*.

TREASURY DEPARTMENT,
Second Comptroller's Office, June 20, 1855.

SIR : The papers relating to the claim of Lieutenant Colonel Kearney, of the topographical engineers, for forage from 1st of May, 1816, to 30th June, 1820, and for double rations from 15th April, 1836, to 31st March, 1837, received with your letter of the 5th instant, are herewith respectfully returned.

In regard to that part of the claim relating to forage, I concur with you. With great regard for the high character of Lieutenant Colonel Kearney, and relying fully upon any statement or certificate by him as to matters clearly within his recollection, the facts that so long a period of time has elapsed since the date of the commencement of this claim—the apparent discrepancy alluded to in your letter—that subsequent accounts were rendered by him and payments made for his pay and emoluments during all that period, including charges of same nature as this, and in which the present claim was entirely overlooked, or never thought of, and formed no part—that these items were stricken out of his accounts for the proper periods to which they belonged, and apparently by himself, and that during all the above period it has been as much in his power to present this claim and proof as now, and when his knowledge of the circumstances must have been more fresh and distinct, present considerations to my mind of that character which renders this claim, at the least, exceedingly doubtful, if not altogether inadmissible.

Besides all these, it is right to assume that Lieutenant Colonel Kearney's declaration of the correctness of his subsequent pay accounts, running through the lapse of years which has since intervened, was an implied waiver of the strongest character of his alleged right to the allowance now claimed, but stricken out as above stated. It is a legal principle that every one should take advantage of his rights at the proper time, and it has been a long-standing rule of this Department that items of charge should be included if practicable in the account for the quarter in which they accrued, and that if subsequently presented the fullest explanation and proof should be required. The rule is a sound and judicious one ; for if items can be capriciously stricken out or omitted and years afterwards paid, it would be almost impossible to tell with certainty when an officer's account was actually settled.

Regarding the general principles by which claims of long standing are affected by lapse of time, you are referred to the opinion of Attorney General Crittenden, of September 13, 1850, in the case of a claim of the representative of one Ross for money credited the decedent on the books of the treasury. In this opinion the Attorney General says, "the long delay which has occurred in this case and the great lapse of time * * * create such strong legal presumptions against the claim that it ought not to be allowed and paid by the officers of the Treasury, without a previous recognition of the debt by Congress, and authority from them to liquidate and pay it." This principle is certainly applicable to and constitutes sound policy in the action of the accounting officers in the case before me.

Recently several claims going back from twenty to forty years, have been presented by officers for pay and allowances which they failed to claim at the proper time, and it therefore seems necessary to adhere to some principle recognizing the finality of a settlement for the time it covers, and not to favor claims so long postponed that the facts and evidence on either side may have fallen into oblivion.

With regard to that part of the claim referring to double rations, I do not conceive it competent for the accounting officers to admit the same, without the express sanction of the Department of War—the decision of that Department of 21st July, 1837, in case of the claim of Captain Turnbull, referred to in the papers before me, is not *general*, nor intended to govern in other (though precisely analogous) cases, but is specific and express, regarding Captain Turnbull's claim only, and in no way applicable to that of Lieutenant Colonel Kearney. Without the sanction of the proper officer of that Department his claim as above cannot be allowed.

Very respectfully, your obedient servant,

J. M. BRODHEAD, *Comptroller*.

P. CLAYTON, Esq., *Second Auditor*.

TREASURY DEPARTMENT,

Second Auditor's Office, June 26, 1855.

SIR: In compliance with your verbal request of this day, I send enclosed a copy of the decision made by J. M. Brodhead, esq., Second Comptroller, on the 20th instant, upon the claim of Lieutenant Colonel Kearney, of the topographical engineers, for forage and double rations.

Very respectfully, your obedient servant,

P. CLAYTON, *Second Auditor*.

R. BURGESS, Esq., *Present*.

TREASURY DEPARTMENT,

Second Auditor's Office, June 5, 1855.

SIR: In answer to your reference of the claim of Lieutenant Colonel Kearney, of the topographical engineers, I make the following report:

Lieutenant Colonel Kearny, claims forage for four horses from 1st May, 1816, to 31st July, 1819, amounting to \$1,248, and two horses from 1st August, 1819, to 30th June, 1820, \$176. If he never received it, and employed and kept the horses in service for the time he charges, he would be entitled.

By reference to his pay accounts for the period embraced above, I find that the forage and horses are almost invariably erased, thereby indicating that his attention must have been called to the subject, and leaving the inference that the horses were not employed and kept in service; for in the pay account immediately succeeding the 30th May, 1820, he charges upon the usual certificate for four horses.

I would not for a moment doubt the certificate of Lieutenant Col-

onel Kearney, and attribute the apparent discrepancy between the certificate upon which his present claim is based and his pay accounts, made out nearly forty years ago, to want of recollection; for you will perceive that, in the claim now presented, the month of June, 1820, is included, while it appears he actually received pay for that month for four horses, two in money and two forage in kind. With these facts, I do not think that this part of his claim should be allowed.

The other portion of his claim for double rations from 15th April, 1836, to 31st March, 1837, while he was chief engineer, by assignment of the War Department, upon a railroad on the Eastern Shore of Maryland, amounts to \$280.

It appears from the certificate of the paymaster general, that Lieutenant Colonel Kearney received double rations prior to and succeeding his assignment to duty in Maryland. It would, therefore, appear equitable at least that he should receive the same compensation, as he was under orders from the War Department, unless the private company for whom he was acting remunerated him for his services; then it might be questionable whether the government should give him the additional rations. As to his legal right to it, I consider it a matter of fact exclusively pertaining to the War Department. Did he exercise the command during the period claimed, which entitles him to double rations?

Very respectfully, your obedient servant,

P. CLAYTON, *Second Auditor.*

Hon. JOHN M. BRODHEAD,

Second Comptroller.

TREASURY DEPARTMENT,

Second Auditor's Office, September 28, 1857.

I certify that the above and foregoing is a true copy from the original on file in this office.

T. J. D. FULLER, *Auditor.*

The United States to Major James Kearney, Lieutenant Colonel Topographical Engineers, Dr.

Forage for four horses from May 1, 1816 to July 31, 1819, 39 months, at \$32 per month.....	\$1,248 00
Forage for two horses from August 1, 1819, to June 30, 1820, 11 months, at \$16 per month.....	176 00
Double rations, commanding, from April 15, 1836 to March 31, 1837, 351 days, at four rations per day, making a total of 1,404 rations, due at Washington, at 20 cents per ration	280 80
Road on the Eastern Shore of Maryland. Also office of topographical engineers.	
	\$1,704 80
Subsistence, \$280 80; forage, \$1,424; amount.....	\$1,704 80

United States to James Kearney, Major Topographical Engineers, Dr.

June 30, 1820.

To this amount due me for forage for four horses, from May 1, 1816, to June 30, 1820, inclusive, being fifty (50) months, at \$8 per month for each horse.....	\$1,600 00
Deduct from the above the commuted value of the forage furnished me in kind, by the quartermaster's department, between August 1, 1819, and June 30, 1820, viz: for two horses, eleven months, at \$8 per month.....	176 00
	\$1,424 00

WASHINGTON, *May*, 1855.

For the information of the accounting officers I have to state, that the officers of the pay department from whom I received pay between April, 1816, and August, 1820, were the following, viz:

At Washington, Satterlee Clarke.

At Norfolk, Le Roy Opie and Charles Smith.

At Boston, D. S. Townsend, in 1820, and I believe from no other officer, unless possibly from the paymaster at New York, Major Talmadge, or Major Leslie.

I received forage in kind only from the officers or agents of the Quartermaster's department at Washington; probably Truman Cross, or Captain Cox.

JAMES KEARNEY.

DISTRICT OF COLUMBIA, *County of Washington*:

On this 24th day of November, 1855, personally appeared before the subscriber, a justice of the peace in and for the District and city aforesaid, Nicholas Callan, a resident of said city, who, being duly sworn according to law, declares that within the period from 1816 to 1820, and ever since, he has resided in the city of Washington, and during said period in the immediate neighborhood of the home and residence of James Kearney, an officer of the United States army, and now a lieutenant colonel of the corps of topographical engineers; that within the aforesaid period, he has a perfect recollection of two horses, kept in the stable attached and belonging to the premises of said Kearney, one a bobtailed black, and the other a sorrel, of fine figure and form, with white or flaxen mane. That said horses were attended to and taken care of by an old black man in the employment of the family of James Kearney, then residing on the premises—he himself being generally absent from home; and he has every reason to believe, and does believe, that said horses were the property of said James Kearney, he being then considered the head of the family. The deponent further states, that the facts became deeply impressed upon

his mind in consequence of his immediate proximity to the residence of James Kearney, and his almost daily habit of passing through the alley upon which was situated the stable aforesaid, to his own home; and that being well known to the old black man who attended to said horses, he generally stopped to talk with him, and to look at, and notice said horses, and in that way, and from those circumstances, the statements he has made became deeply impressed upon his mind, and he now retains a vivid recollection of the same.

N. CALLAN.

Sworn and subscribed before me.

N. B. VAN ZANDT, [L. s.]
Justice of the Peace.

Admitted in evidence.

J. D. McPHERSON,
Deputy Solicitor.

DISTRICT OF COLUMBIA, *County of Washington* :

On the 24th day of November, 1855, personally appeared before me, James McCleary, who, being duly sworn, declares that James Kearney, an officer of the army, and now lieutenant colonel of the corps of topographical engineers, was his near neighbor within the period from 1816 to 1820; that he has a perfect recollection of a small horse or pony, kept and used by the family of said James Kearney, within and about that time. That said James Kearney himself was much absent from home, and that he never heard or understood that said horse belonged to any one else. That said James Kearney, being the eldest son of his deceased parents, was considered the head of the family, and had charge of the home establishment, and paid the general expenses thereof.

JAMES McCLEARY.

Sworn and subscribed before me.

N. CALLAN, [L. s.]
Justice of the Peace.

Admitted in evidence.

J. D. McPHERSON,
Deputy Solicitor.

WASHINGTON, *May 30, 1855.*

SIR: I enclose herewith an account for forage due to me by the United States, from the 1st May, 1816, to the 30th June, 1820, amounting to \$1,424, and also for double rations under the regulations of September 1, 1832, for \$280 80.

I have to state, in connexion with the first and second items of this account, that I was not furnished with forage in kind, nor money in lieu of it, during any part of the time charged in the account, except during the period of the second item, when I received occasional al-

lowances in kind from the Quartermaster's department, at the city of Washington. I did not draw commutation of forage from the paymaster general's department until I drew it for the month of July, 1820, from Major Townsend, at Boston, I think.

In relation to the forage part of the account, I have to say, moreover, that, having been compelled for many years, or in fact ever since I have been in commission, to give my undivided attention to the public service, the account in question, with others which concern my private interests, has been laid aside until now that there is some occasional leisure, and the opportunity of attending to and investigating it. Until very recently it was impossible for me to present it in a definite form.

As to the item for double rations in the same account, I have to say, that it would have been presented long ago if I had been aware of the decision of Hon. Mr. Poinsett, in Captain Turnbull's and other similar cases. That decision became known to me only during the present year. I enclose a copy of it, and of the original regulation. Also a copy of the order by which I was put upon duty on the Eastern Shore of Maryland. I may add that since the date of my commission of major, in 1816, I have been invariably on duty, except, perhaps, for some two or three months; have always had a separate command, and while in the field, in detached and out of the way places, unconnected with the general body of the service.

Although these explanations are not really necessary, or called for, as I think, by law or regulation, and are not offered in support of my account for forage and double rations, I think it right that they should accompany the account.

My duties from April, 1816, to the autumn of 1821, extended along the Atlantic coast, from Cape Fear river to Boston. This fact, together with my notes and recollections, enable me to indicate the officers of the pay department by whom my accounts were paid. I annex a list of them in order to facilitate investigation, and have, moreover, to say, that the records of the Engineer department will show my whereabouts during the period in question.

I am, sir, very respectfully, your obedient servant,

JAMES KEARNEY,

Lieutenant Colonel Topographical Engineers.

Major ST. CLAIR DENNY.

FORAGE.—The certificate should be consistent with the items charged.

Cases in which back forage has been allowed to officers adjudged to have been in the exercise of their brevet rank, viz:

General Macomb, April 16, 1816, to May 31, 1821; allowed June 18, 1839.

General Scott, March 4, 1837, to March 4, 1841.

General Jones, March 3, 1839, to March 4, 1841; under act March 3, 1839.

General Gibson, March 3, 1835, to October 31, 1836; January 29, 1841.

Also Col. Jos. G. Totten, March 1, 1825, to December 7, 1838; January 19, 1841.

Col. Many, February 1, 1822, to June 30, 1834; United States Court.

Colonel Talcott, December 29, 1829, to May 3, 1832; March 3, 1841.

Also Gen. Gratiot, and numerous other cases in which back forage was drawn under the usual certificates of the officers. (See General Jesup's letter; see General Lawson's letter.)

Also Col. Abert, November 22, 1824, to May 6, 1826; March 23, 1841.

The act of April 24, 1816, (3 Stat., 297,) entitles officers to commutation of forage for the number of horses authorized by existing regulations.

In the edition of Army Regulations of 1821, will probably be found a regulation fixing the number, (though fixed by law, act of 1828,) and in that edition the several paragraphs have affixed the date of their adoption.

What number of horses does that regulation allow majors of cavalry, and when was the regulation adopted?

If any earlier regulation be found in force in 1816, please cite it.

J. D. McPHERSON.

Answer. The act of April 24, 1816, allows eight dollars for each horse authorized by existing regulations.

By the *Regulations of 1814*, three horses are allowed to majors of artillery and infantry.

By the *Regulations of 1816*, three horses are allowed to lieutenant, colonels and majors.

This regulation of 1816 is adopted and republished in 1820 and 1821.

ENGINEER DEPARTMENT, *July 16, 1836.*

SIR: Some of the officers of the corps of engineers, and officers of the army associated with them and this department, are called upon to superintend several works at the same time, distant from each other; and works of such extent as to draw them from their stationary and fixed quarters; making it indispensably necessary that they should occupy quarters and use fuel at each of such separate superintendences, and various points on such extended line of improvements; at the same time, that they must be provided with fuel and quarters at some point convenient for their headquarters. The existing regulations and commuted allowances, do not provide for supplying these necessary and indispensable wants of the officers above referred to, who are often, and frequently called upon to give their time and attention to such different positions. To enable them to perform such services, I must request you will authorize a commutation of fuel and quarters, to the amount of fifty cents per day, for each work, when more than one, that they are called upon to superintend, and from each position, when more than one on an extended line of improvements; when these officers have an assistant permanently stationed, in addition to the present allowance of fuel and quarters, or

commutated allowance, as the case may be, to be now granted them. This additional commutation to be charged in all cases to the appropriation for such works respectively, and paid therefrom during the continuance of such operations, works, or improvements.

I am, &c.,

C. GRATIOT.

Hon. LEWIS CASS, *Secretary of War*.

JULY 16, 1836.

I consider the suggestions of General Gratiot entitled to great weight. From the great number of public works to be constructed this year, and from the limited number of the experienced officers of the engineer corps capable of directing them, it has been found necessary to assign to some of them the superintendence of many of these works. Their expenses on account of quarters and fuel are thus much increased, and I think some allowance should be made to meet this additional burden, though not to the extent recommended by Gen. Gratiot. It appears to me, that an addition of one dollar and fifty cents to the present commutation for quarters and fuel is as much as ought to be allowed. Let this be the maximum, and to be granted to no officer not superintending more than two works. And when General Gratiot thinks right, he will recommend a graduation; so that those having the most works may receive the highest allowance.

But this arrangement will be considered as entirely provisional, and of no force whatever, unless approved by the President. Should the President approve it on his return, it will take effect from this date.

LEWIS CASS.

Respectfully referred to the President of the United States for his directions. This course is taken at the request of the Secretary of War.

C. A. HARRIS,

Acting Secretary of War.

Upon an account and proper vouchers for the extra expense incurred being made out, let them be allowed agreeably to the within recommendation.

A. J.

WAR DEPARTMENT, *May 13, 1840.*

The foregoing regulation is considered as embracing officers of both of the corps of engineers from its date, and their accounts will be settled accordingly.

J. R. P.

TOPOGRAPHICAL BUREAU,

Washington, March 28, 1837.

SIR: You are assigned to the survey of the coast of North and South Carolina, as indicated in a law of the last session of Congress, of which a copy is herewith enclosed.

As details of officers from the army for such duties are not expected, you will organize your assistants from such civil engineers of ability as you can obtain.

It is extremely desirable that this duty should be executed as early as practicable. You are therefore authorized to employ one principal assistant, at a compensation of four dollars per day; and five subordinate assistants, at a compensation of three dollars and a half per day, with an allowance of ten cents per mile for transportation. G. W. Featherstonhaugh, jr., an assistant civil engineer, will be directed to report to you. His compensation is the same as that allowed to your subordinate assistants, but is to be paid out of the appropriation for surveys; that of your other assistants, and all other expenses of the survey now placed under your direction, is to be taken out of the special appropriation of ten thousand dollars for that survey.

You will submit to this office an estimate for the requisite funds, stating where you wish the same to be placed; and will also furnish this office with a list of your assistants, and of the dates at which their several compensations will commence.

If tents should be required for the duty, your requisition for the same will be attended to without delay.

The enclosed copy of instructions to Major McNeill, will inform you that he is required to make a reconnoissance of as much of the survey placed under your charge as lies within the State of South Carolina.

Respectiully sir, your obedient servant,

J. J. ABERT.

Lieutenant Colonel Topographical Engineers.

Lieut. Col. J. KEARNEY,

United States Topographical Engineer.

Dr. The United States to James Kearney, Lieutenant Colonel Topographical Engineers.

To per diem allowance in addition to the usual allowance for quarters and fuel, allowed by the regulation of the Secretary of War and sanctioned by the President of the United States of the 16th of July, 1836, while engaged upon an extended line of improvement, viz:

The Eastern Shore railroad, Maryland, from 14th April, 1836, to 28th March, 1837, inclusive, 349 days, at \$1 50 per day... \$523 50

To per diem allowance in addition to the usual allowance for quarters and fuel claimed in pursuance of the above named regulation of 16th July, 1836, while engaged upon an extended line of improvements in North and South Carolina, from 29th March, 1837, to 16th April, 1839, inclusive, 749 days, at \$1 50 per day..... 1,123 50

\$1,647 00

JAMES KEARNEY.

JULY 16, 1836.

I consider the suggestions of General Gratiot entitled to great weight. From the great number of public works to be constructed this year, and from the limited number of the experienced officers of the engineer corps capable of directing them, it has been found necessary to assign to some of them the superintendence of many of those works. Their expenses on account of quarters and fuel are then much increased, and I think some allowance should be made to meet this additional burden, though not to the extent recommended by General Gratiot. It appears to me that an addition of one dollar and fifty cents to the present commutation for quarters and fuel is as much as ought to be allowed. Let this be the maximum, and to be granted to no officer not superintending *more* than two works. And when General Gratiot thinks right, he will recommend a graduation, so that those having the most works, may receive the highest allowance. But this arrangement will be considered as entirely provisional, and of no force whatever, unless approved by the President. Should the President approve it on his return, it will take effect from this date.

L. C.

Letters issued, volume 1, page 132, November 21, 1831, Lieutenant Colonel Abert's report to the Secretary of War, Governor Cass, upon the application of Captain J. D. Graham, for a per diem allowance of \$250 while commanding in the field

Colonel Abert recommends that "all officers of topographical engineers not entitled to forage, and whose duties require them to be mounted, while on duty in the field and in command under the direct orders of the Bureau, be allowed a per diem of \$250, shall be in lieu of quarters, fuel, transportation, and forage."

Lieutenant Colonel Abert says: "This per diem was first established at \$250 in 1825, in favor of Captain Poussin and Lieutenant Trimble, on a reconnoissance of the great road to New Orleans; and, secondly, in 1826, with the case of Captain McNeill, on the Cumberland road, and subsequently, in 1827, on the railroad from Baltimore to the Ohio, and then again in 1829, continued to Captain McNeill on the Baltimore and Susquehanna railroad." Probably the allowance was continued until the resignation of McNeill.

TOPOGRAPHICAL BUREAU,
Washington, April 9, 1836.

SIR: As soon as you have completed the report of the duty assigned to you in the orders of this Bureau of the 23d of May last, you will call on Littleton Dennis Teakle, esq., and inform him that you are ready to take in charge the survey for which he has applied.

Mr. Teakle is one of the commissioners on the part of the State of Maryland for the purpose of superintending the survey of the route

for a railroad on the Eastern Shore of Maryland. He has applied for a chief engineer to superintend the work, and you are hereby assigned to that duty. The route which the railroad is to pursue is generally pointed out by a resolution of the General Assembly of Maryland, passed during its last session. But upon these matters you will take the direction of the commissioners.

As all the expenses of the survey are to be paid by the State, you will address your estimates for these, and for the assistant engineers and instruments required, to Mr. Teakle, who represents the board of commissioners, and is authorized to make all the necessary arrangements.

I am, respectfully sir, your obedient servant,

J. J. ABERT,

Lieutenant Colonel Topographical Engineers.

Lieutenant Colonel J. KEARNEY,

Topographical Engineers, Washington.

Claims.

April 9, 1836. Ordered to E. S. railroad—sanction of the President.
Double rations, regulation 1st September, 1832.

April 14, 1836. My Muscle Shoals report.

March 28, 1837. Ordered on survey coast—Carolinas, continuation of 1835.

October 19, 1837. McNeill's reconnoissance turned over to me.

March 20, 1838. Survey of Elizabeth road, part prolongation of the above under an order of the Senate.

September 8, 1838. Funds, \$500 furnished on my estimate.

February 4, 1839. Told Mr. R. Cutts we had worked out what we had to do for the United States. Told Mr. Calahan the same.

March 18, 1839. Ordered on board of inspection.

April 17, 1839. To assemble.

July 12, 1839. Received per diem to date.

August 8, 1839. Date of H. Smith's accounts forwarded to bureau.

April 17, 1840. Date of note from the Globe office.

August 23, 1838. Ordered to inspect certain harbors at Burlington, Whitehall, Two Heroes, Plattsburg, Vermilion, St. Joseph's, and Michigan city.

September 8, 1838. Ordered on certain roads in Wisconsin, Mr. Sitgreaves, to be left in the country to superintend them.

September 10, 1838. Engagement with States and companies to terminate next spring; so says circular to Long, Swift, Hughes and Kearney.

JULY 16, 1836.

I consider the suggestions of General Gratiot entitled to great weight. From the great number of public works to be constructed this year, and from the limited number of the experienced officers of the engineer corps capable of directing them, it has been found necessary to assign to some of them the superintendence of many of

these works. Their expenses on account of quarters and fuel are thus much increased, and I think some allowance should be made to meet this additional burden, though not to the extent recommended by General Gratiot. It appears to me that an addition of one dollar and fifty cents to the present commutation for quarters and fuel is as much as ought to be allowed. Let this be the maximum, and to be granted to no officer not superintending more than two works. And when General Gratiot thinks right, he will recommend a graduation, so that those having the most works may receive the highest allowance. But this arrangement will be considered as entirely provisional, and of no force whatever, unless approved by the president. Should the President approve it on his return, it will take effect from this date.

L. C.

[Copy of the endorsements on the foregoing.]

Respectfully referred to the President of the United States for his directions. This course is taken at the request of the Secretary of War.

JULY 19, 1836.

C. A. HARRIS,
Acting Secretary of War.

Upon an account of proper vouchers for the extra expense incurred being made out, let them be allowed agreeable to the within recommendation.

A. J.

ENGINEER DEPARTMENT, *January 9, 1838.*

I certify that the above and foregoing is a true copy from the originals now on the files of this office.

H. G. WRIGHT,
Captain of Engineers, in charge.

The practice of the War Department has been to pay all expenses of the surveys which the President might order under a conviction that they were of national importance.

Also the expenses of such surveys as Congress from time to time directed to be made.

But surveys of works of incorporated companies in the States, or of such as might be applied for by the States, in such cases the expenses have not been met by the government. Except the pay of the officers furnished and the necessary instruments for the surveys, no expense has been incurred by the government.

ENGINEER DEPARTMENT, *July 16, 1836.*

SIR: Some of the officers of the corps of engineers, and officers of the army associated with them and this department, are called upon to superintend several works at the same time, distant from each other, and works of such extent as to draw them from their stationary and

fixed quarters—making it indispensably necessary that they should occupy quarters and use fuel at each of such separate superintendencies, and various points on such extended line of improvements, at the same time that they must be provided with fuel and quarters at some one point convenient for their headquarters. The existing regulations and commuted allowances do not provide for supplying these necessary and indispensable wants of the officers above referred to, who are often, and frequently, called upon to give their time and attention at such different positions.

To enable them to perform such services, I must request you will authorize a commutation of fuel and quarters to the amount of fifty cents per day for each work, when more than one, that they are called upon to superintend; and for each position, where more than one, on an extended line of improvement, where these officers have an assistant or superintendent permanently stationed, in addition to the present allowance of fuel and quarters, or commuted allowance, as the case may be, now granted them.

This additional commutation to be charged, in all cases, to the appropriations for such works respectively, and paid therefrom, during the continuance of such operations, works, or improvements.

Very respectfully, sir, your most obedient servant,

C. GRATIOT.

Hon. LEWIS CASS, *Secretary of War.*

ENGINEER DEPARTMENT, *January 9, 1858.*

I certify that the above and foregoing is a true copy from the originals now on the files of this office.

H. G. WRIGHT,

Captain of Engineers, in charge.

TOPOGRAPHICAL BUREAU,
Washington, October 19, 1837.

SIR: In consequence of orders to Major McNeill to repair to Florida, that part of the examination of the southern coast directed by the resolution under which you are acting, and which had been committed to Major McNeill, is now committed to you. You will therefore make your arrangements accordingly.

It is not expected that you will be able to extend your surveys over this part (the coast of South Carolina) during the present season; but, as it is extremely desirable to have a general view of the entire matter embraced by the resolution before alluded to, you are directed, for this purpose, to extend your reconnoissance to Charleston, by which you will be able to report upon the whole, and to sustain the department in its contemplated applications for an additional appropriation to complete the surveys.

Very respectfully, sir, your obedient servant,

J. J. ABERT,

Lieut. Col. Top. Engineers.

Lieut. Col. JAS. KEARNEY,

U. S. Top. Engineer, Washington, D. C.

Dr. The United States to James Kearney, Lieut. Col. Top. Eng.

To per diem allowance as a member of the board of internal improvements, in pursuance of the order of the War Department of the 15th January, 1830, in reference to the Muscle Shoals improvement from the 30th day of January, 1830, to the 28th day of March, 1831, being 423 days, at \$4 50 per day.....	\$1,903 50
To per diem allowance as a member of the same board, in pursuance of the regulation of the Secretary of War of the 3d of June, 1830, in relation to the surveys and reports on the Pennsylvania and Ohio improvements, and also in continuation of the Muscle Shoals improvement, from the 29th day of March, 1831, to the 14th day of April, 1836, inclusive, being 1,843 days, at \$4.50 per day...	8,293 50
	\$10,197 00

From which is to be deducted the amount received for quarters, fuel, per diem, and transportation, to be ascertained at the Treasury Department, within the periods specified.

JAMES KEARNEY.

WASHINGTON, *May*, 1856.

Lieutenant Colonel James Totten, for per diem allowance, as member of the board of engineers, while engaged in the examination of the Ohio and Mississippi rivers, from October 1, to December 31, 1821, 92 days, at \$4 50 per day.....	\$414 00
Do. from January 1, to April 30, 1822.....	540 00
Do. from July 28, to September 6, 1823.....	229 50
Do. from September 17 to December 31, 1823.....	535 60
Do. from January 1 to 24, 1824.....	108 00
Do. from May 7 to 22, 1824.....	72 00
Do. from June 19 to December 9, 1824.....	783 00
General S. Bernard, do. from December 13, to December 31, 1821.....	85 50
Do. January and February, 1822.....	265 50
Do. from March 11 to April 30, 1822.....	274 50
Do. from July 15 to 27, 1823.....	58 60
Do. from September 17 to December 31, 1823.....	477 00
Do. from July 28 to September 16, 1823.....	229 50
Do. from May 7 to July 31, 1824.....	387 00
Do. from August 1 to 31, 1824.....	414 00
Do. from November 1 to December 11, 1824.....	180 00
Do. from January 1 to 24, 1824.....	108 00
Do. from August 5 to October 31, 1825, and March 1 to August 4, 1825.....	769 00
Do. from April 7 to September 30, 1827.....	796 50

Do. from May 29 to June 6, 1826.....	40 50
Do. from July 3 to 18, 1826.....	72 00
Do. from October 30 to December 1, 1826.....	158 00

DEPARTMENT OF WAR, *May 12, 1818.*

Until otherwise ordered, the chief engineer, while resident at Washington, will be allowed at the rate of nine hundred and twelve dollars a year, in lieu of fuel and quarters. He will also receive double rations.

[The officers who compose the board of engineers will be allowed \$4 50 a day in lieu of fuel, quarters, transportation, and the per diem allowance for reconnoitering, while engaged in duties assigned the board.]

The officer whom General Swift may detail to aid in performing the duties of the engineering department, will be allowed one dollar and fifty cents a day in lieu of fuel and quarters.

J. C. CALHOUN.

ENGINEER DEPARTMENT,
Washington, December 13, 1855.

I certify the foregoing to be a true copy from the records of this office.

By order of General Totten.

J. D. KURTZ,
1st Lieutenant of Engineers, A. C. E.

ENGINEER DEPARTMENT,
Washington, May 31, 1824.

GENTLEMEN : I am directed by the Secretary of War to inform you that the President has, under the authority of the act of Congress, dated the 30th of April, 1824, appropriating \$20,000 for the purpose of procuring the necessary surveys, plans, and estimates, upon the subject of roads and canals, appointed you as a board of internal improvement to superintend the execution of the provisions of said act. There will be attached to the board for the present, Major Abert, of the topographical engineers, with five assistant lieutenants, Captain McNeill of the same corps with an equal number, and Mr. Schriver, who is well acquainted with the localities of the country, and who is authorized to employ, under your directions, five citizen surveyors. Captain Poussin, of the topographical engineers, and Lieutenants Courtenay and Dulton, of the corps of engineers, will be immediately attached to the board in its operations. The officers detailed for service, and the citizens employed will report to the board for orders. The rules and regulations established in the prosecution of the survey of the coast *will apply* in the disbursement of the appropriation and

the compensation to be allowed the officers of the army who may be detailed for service under the act. The board will observe the same rules in reporting from time to time the progress made in the execution of the duties assigned to them.

The board will proceed to make an immediate reconnoissance of the country between the tide-waters of the river Potomac and the head of steamboat navigation on the Ohio, and between the Ohio and Lake Erie, for the purpose of ascertaining the practicability of a communication between those points; of designating the most suitable route for the same, and of forming plans and estimates in detail of the expense of execution.

It is very desirable that the report should be received on this important line of communication in time to be submitted to Congress at their next session. The board will accordingly use every possible exertion to effect that object.

I am, sir,

ALEX. MACOMB,
Major General, Chief Engineer.

General BERNARD, *Assistant Engineer.*

Lieut. Col. TOTTEN, *of the Corps of Engineers.*

JOHN L. SULLIVAN, *Civil Engineer.*

ENGINEER DEPARTMENT,
Washington, December 13, 1855.

I certify the foregoing to be a true copy from the records of this office, being copy of a communication from Alex. Macomb, major general, chief engineer, to General Barnard, assistant engineer, Lieutenant Colonel Totten, of the corps of engineers, and John L. Sullivan, esq., civil engineer, dated May 31, 1824.

By order of General Totten.

J. D. KURTZ,
1st Lieutenant of Engineers, A. C. E.

TREASURY DEPARTMENT,
Third Auditor's Office, September 4, 1858.

SIR: On the 3d ultimo I received yours of the 16th, stating that in a report from this office in 1842, printed in Doc. 18, Ho. Reps., 28 Cong., 1st session, on page 30, is a statement of payments to Maj. R. E. DeRussy, and the fourth item is a payment of \$4 per day as agent of fortifications. That this payment has been cited as a precedent in another case, as having been made under the regulation of 1818, giving four dollars and a half to members of the board of engineers, and you request to be furnished with a copy of so much of the account as will show the true character of the charge to be laid before the Court of Claims.

The account in question is unfortunately lost, so that a literal compliance with your request is at this time impossible; but I have no

doubt that it consisted of two items of two dollars each, as at no time was there an existing regulation of the War Department giving an officer of the army a per diem of four dollars for any one service, like that upon which Major DeRussy was employed. The entry of the voucher upon the abstract is "for extra pay, &c.," for May and June, 1821. In his next account for the third quarter of 1821, at the same place, to wit, Mobile Point, Alabama, his charge is as follows:

For his extra compensation, and commutation of transportation, from the 1st of July to the 30th of September, 1821, 92 days, extra compensation as agent at $2\frac{1}{2}$ per day	\$184 00
Commutation of transportation at \$2 per day.....	184 00
	368 00

Allowed in the special decision of the Hon. J. C. Calhoun, Secretary of War, and paid September 30, 1821.

To show more fully the object for which the regulation of 1818, allowing the per diem of \$4 50, was intended to provide, I submit the following extract from the report of this office upon the accounts of De Russy of the 22d of November, 1847, to wit:

Item 1, V. 32, abstract A. first quarter, 1822, Capt. R. E. DeRussy's account for services as a member of the board of engineers, from which was deducted \$2 00 per day allowed to him by regulations for disbursing at Mobile Point	\$44 00

In the vouchers, the charge stands thus:

January, 1822. For his services as a member of the board of engineers from the 1st to the 22d of January inclusive, 22 days, at \$4 50 per day.....	\$99 00

With the following certificate appended:

"I certify that, agreeably to the instructions of the chief engineer of the United States, I was a member of the board of engineers (ex officio) during the time above charged.

R. E. DERUSSY,
Captain United States Engineers."

It appears that this voucher, with others, was submitted by the Auditor to the decision of the Secretary of War, by whom it was referred to the Engineer department, whose action thereon is thus endorsed:

"ENGINEER DEPARTMENT, *April*, 1823.

Recommended for allowance, after deducting two dollars per diem, already charged as commutation of transportation, which is one of the objects for which the within allowance is intended to provide.

ALEX. MACOMB,
Major General, Chief Engineer.

A deduction of \$44 for 22 days, at \$2 per day, was accordingly made from the amount of his account, and \$55, the balance, allowed and passed to the credit of Captain DeRussy in settlement (No. 1574, June 3, 1823,) of his accounts for 1st, 2d, 3d quarters 1822, as well as the following items in voucher 27, abstract A, 1st quarter 1822, for Mobile Point, on the like recommendation and sanction, viz:

March 31, 1822. For his compensation as disbursing officer of engineers on the Gulf of Mexico frontier, from the 1st of January to the 31st of March, 90 days, at \$2 00 per day.....	\$180 00
For his commutation of transportation from the 1st of January to the 31st of March, 90 days, at \$2 per day.....	180 00
	360 00

By a regulation of the Department of War under date of the 12th of May, 1818, "the officers composing the board of engineers were allowed \$4 50 per day, in lieu of *fuel, quarters, transportation*, and the *per diem allowance* for reconnoitering "while engaged in the duties assigned the board until otherwise ordered." And by another regulation of that department, under date of the 7th of June, 1822, "the commutation of \$4 50 heretofore allowed to the board of engineers in lieu of transportation, quarters, and fuel, was discontinued from the 1st of May, 1822, until further ordered."

From a consideration of the facts thus presented, the propriety is not perceived of now admitting to the credit of Col. DeRussy the above mentioned sum of forty-four dollars, disallowed, as seen on the recommendation of the Engineer department, sanctioned by the Secretary of War."

Upon the foregoing, the Second Comptroller, on the 13th of December, 1847, decided as follows: "I have carefully examined the several claims described in the foregoing report, and am of opinion that item 1, in abstract 1, is *inadmissible*."

ALBION K. PARRIS, *Comptroller*."

I am, very respectfully, your obedient servant,

ROBT. J. ATKINSON, *Auditor*.

JOHN D. MCPHERSON, Esq.,

Deputy Solicitor Court of Claims, Washington, D C.

The United States to R. E. DeRussy, Captain Engineers, Dr.

August and September, 1818. For extra services rendered whilst a member of the board of engineers in the harbor of New York, agreeably to the regulations of the War Department of 16th November, 1816, commencing on the 4th of August and ending on the 26th of September, 1818, 53 days, at \$4 50 per day.... \$238 50

Deduct for quarters, (received,) 53 days, at \$1 7 per month.....	\$30 03 $\frac{2}{3}$	
Deduct for fuel, 53 days, at \$3 per month.....	5 30	
		35 33 $\frac{2}{3}$
Amount due.....		203 16 $\frac{2}{3}$

I certify, on honor, that the foregoing account, amounting to two hundred and three dollars and sixteen and two-thirds cents, is accurate and just.

R. E. DERUSSY,
Captain U. S. Engineers.

(A true copy.)

Allowed, March 10, 1819. Settled, 4492.

ENGINEER DEPARTMENT,
Washington, December 13, 1855.

SIR: In compliance with the request contained in your letter addressed to the Secretary of War, dated the 10th instant, I send herewith for your use certified copies, from the records of this office, of the following papers:

1. Communication from Alexander Macomb, major general, chief engineer, to Gen. Bernard, assistant engineer, to Lieutenant Colonel Totten, of the corps of engineers, and John L. Sullivan, esq., civil engineer, dated May 31, 1824.

2. Order of William M. Crawford, Secretary of War, authorizing certain per diem allowances to certain officers of the corps of engineers, dated March 7, 1816.

3. Order of John C. Calhoun, Secretary of War, authorizing certain rates of commutation for fuel and quarters to the chief engineer officers composing the board of engineers and officers assisting in duties of engineer department, dated May 12, 1818.

Very respectfully, your obedient servant, by order of Gen. Totten,

J. D. KURTZ,

Lieut. of Engineers, A. C. E.

Mr. RICHARD BURGESS, *Washington city.*

NOVEMBER 2, 1857.

Memorandum for Mr Burgess.

Find the period of service on the old board. *Quere.* Board Internal Improvement? This question is met by the roll of papers handed to Mr. Burgess to-day. The order of January 15th, 1830, marks the beginning of it; the 30th September, 1838, when the board finally vacated its office in Washington, indicates the extreme limits in the other direction. This will be better understood from the roll of papers referred to above.

My orders to take charge of the Eastern Shore railroad, in Maryland, is dated April 9th, 1836. I took charge of it the 14th, and I

continued in charge until I was relieved by the order of March 18, 1839, which assigned me to duty on the board of inspection of certain lake harbors, to assemble April 17.

I was ordered on the survey of the coast region of the Carolinas, with a view to a steamboat navigation, March 28th, 1837, until the exhaustion of the appropriations applicable to it, on or about the 4th of February, 1839.

Mem. It was soon after this, viz: on the 18th of March, same year, that the board of inspection of lake harbors was created. The question of the duration of that board is noticed in the roll of papers accompanying this memorandum.

Extract from the Report of the Third Auditor of the Treasury, dated March 31, 1856, on the claim of R. E. DeRussy, viz:

Page 42, item No. 1. Vo. 32, abstract A. 1st quarter of 1822, account of the claimant for services as a member of the board of engineers from the 1st to the 22d of January, 1822—22 days at \$4 50 per day—\$99: admitted to his credit \$55, and disallowed the balance, \$44.

The claimant, per voucher 27, of the same abstract, was allowed commutation for transportation at \$2 per day, which was a special allowance, exclusive of a per diem of \$2, per same voucher, for disbursing at Mobile point, and a further per diem of \$2, for disbursing at the Rigolets and Chef Menteur, subsequently allowed him under the Comptroller's decision of 13th of December, 1847, all during the above time. The charge for services as a member of the board of engineers was submitted by the Third Auditor for the decision of the Secretary of War, and was referred by the latter to the Engineer department, and was returned with the following endorsement, dated April, 1823: "Recommended for allowance, after deducting two dollars per diem, already charged as commutation of transportation, which is one of the objects for which the within allowance is intended to provide." Accordingly, the \$44 which he had received in lieu of transportation, being \$2 per diem, from the 1st to the 22d January, 1822, was disallowed, and the balance of \$55 admitted to his credit. That is, for the time he served as a member of the board of engineers, he was allowed a per diem of \$4 50, of which \$2 50 was allowed on this voucher, and \$2 on voucher 27, same abstract, for his services as a member of said board, including transportation." &c.

SOLICITOR'S OFFICE, *August 16, 1858*

The above is a true extract from the original report, now exhibited to me.

JAS. D. McPHERSON,
Deputy Solicitor.

The reference on the case of Colonel James Kearney, in relation to his claim as a member of the board of internal improvements, to the case of Major DeRussy, as having received per diem while tempora-

rily acting as member of the board of engineers in May and June, 1821, as shown by doc. 18, 28th Congress, 1st session, will be found on page 30, being the fourth item charged under the name of R. E. DeRussy, although stated to be "extra pay as agent of fortifications, May and June, 1821, 61 days, at \$4 per day," it was believed to have been a clerical error, as at that period no agent of fortifications was allowed that sum; \$4 50 per day being the amount authorized to be allowed to members of the board of engineers, including some other allowances, it was presumed some of which was received in kind by Major DeRussy, and hence a deduction from the \$4 50 of 50 cents per day.

The sum of \$55 received by Major DeRussy as a member of the board of engineers, as shown by the Auditor's report, an extract from which is herewith presented, is wholly omitted in doc. 18, above referred to.

R. BURGESS,
Of Counsel for Kearney.

AUGUST 16, 1858.

[Engineer order, No. 1.]

ENGINEER DEPARTMENT,
Washington, June 10, 1830.

The board of engineers for internal improvements is hereby organized, to consist of the following officers, viz:

General Bernard, assistant engineer.

The topographical engineer in charge of the topographical bureau of the Engineer department.

Such officers of the corps of engineers as may be at any time attached to the board by the chief engineer.

The engineer or other officer, civil or military, who may have conducted the surveys relative to any project submitted to the board, will be considered a member of the board during the preparation of the report on such projected work, and for that purpose only.

The board will, as heretofore, report to and receive their orders from the Engineer department.

Major Poussin will continue to act as assistant to the board.

In consequence of the additional duties hereby assigned to the officer in charge of the topographical bureau, that part of engineer order, No. 3, dated the 20th February, 1829, which requires him to perform the duties of assistant to the chief engineer, in certain cases, is rescinded.

By order of the Secretary of War.

CHARLES GRATIOT,
Brigadier General.

Lieut. Col. J. KEARNEY,
Topographical Engineers, Washington.

Communicated by order of Brigadier General Gratiot.

A. MORDECAI,
Lieutenant Engineers, assistant to Chief Engineer.

ENGINEER DEPARTMENT,
Washington, January 15, 1830.

SIR: I have to acknowledge the receipt of your letter of the 14th instant, accompanied by five books of field notes and eight maps of surveys, relating to the improvement of the navigation of the Tennessee river at the Muscle and Colbert shoals.

These maps and field notes have been sent to the board of internal improvement, by whom a project for the proposed work is to be made; and in order that the board may avail itself of your personal knowledge in relation to this subject, the Secretary of War directs that you be associated as a member of the board in preparing their report. You will therefore see General Bernard, who has the necessary instructions in this matter, and make arrangements with him for the immediate commencement of the report, which it is desirable to have at an early date.

Respectfully, sir, your obedient servant,

C. GRATIOT,
Brigadier General.

To Lieut. Col. JAMES KEARNEY,
Topographical Engineer, Washington, D. C.

Lieutenant Colonel Kearney's Claims.

The act of Congress of April 30, 1824, chap. 46, authorizes the Executive to cause to be procured the necessary surveys, plans, and estimates upon the subject of roads and canals of national importance in a commercial or military point of view, or for the transportation of the public mail. The surveys, plans, and estimates for each, to be laid before Congress. Succeeding acts provide annually, I think, for the same object up to 1838.

The message of the President of the United States, 18th Congress, 2d session, document 32, February 18, 1825, transmits to the Senate the proceedings of the Executive under this act. It contains, amongst other matter, a letter from the chief engineer, written by direction of the Secretary of War, May 31, 1824, notifying General Bernard, Lieutenant Colonel Totten, and Mr. John L. Sullivan of their appointment as a board of internal improvement, to superintend the execution of the act in question. Also, submitting to the board the special duty of ascertaining the practicability of a communication between the Ohio river and Lake Erie. The message contains also the report of General Bernard and Colonel Totten, respecting the first season's operations of the board, with a separate report of Mr. Sullivan, who resigned his membership on the 19th March, 1825.

On the 28th February of the same year, Colonel Totten at his own request was relieved from duty during the absence of the board on a reconnoissance of the route of a road between the city of Washington and New Orleans. It is believed that the colonel had served upon the board with some degree of reluctance, because the duties con-

nected with that service interfered materially with his duties as an engineer of fortifications, and with those pertaining to him as a member of the board of fortifications. Be this as it may, my impression is, that about the period referred to the colonel ceased to take part in the duties of the board of internal improvements. But Mr. David Shriver, of Pennsylvania, was nominally a member for a short time, he having been appointed February 1, 1825, and his letter of resignation being dated the 14th October.

Henceforth until Lieutenant Colonel Kearney's appointment as a member, (15th January, 1830,) General Bernard found himself the sole member of the board, discharging singly all its functions. The general's furlough to France, (December 17, 1831,) closed his connexion with the board; his signature to the report upon the Muscle Shoals improvement being, I think, the last of his acts as a member. But the general having resigned his commission in the army of the United States, August 10, 1831, Colonel Gadsden, of South Carolina, was appointed to succeed him as assistant to the chief engineer. Whether Colonel G. ever had business connexion with the board of internal improvement I do not know. I am pretty confident, however, that he had not, although he held an appointment upon it until November 11, 1831. The office of assistant to the chief engineer was abolished by law, soon after General Bernard's return to France.

The business of the board soon fell into the hands of Lieutenant Colonels Abert and Kearney, topographical engineers, under the provisions of the engineer regulations of June 10, 1830. The board ceased to exist, as I presume, in 1838, an appropriation having been made in that year, viz: July 11, for closing accounts under the act of 1824. See for this appropriation the Military Academy bill for that year.

Colonel Kearney's own connexion with the duties of the board began March 8, 1825, and continued thenceforth until his report of April 14, 1836, upon the condition of the works projected by the board and partially executed, for improving the navigation of the Tennessee river at the Muscle, Beetree, and Colbert's shoals, if not until its dissolution.

The duties assigned to Colonel Kearney, even before he was ordered to the Muscle Shoals, were numerous, extensive, and important as appears by the orders and letters relating to them in the Bureau of Topographical Engineers or in the hands of Mr. Burgess. The field work of the projects contemplated in those orders and letters had been completed, and he was occupied in this city with the office duties proper to them, and especially proper to the project of a canal, by which it was proposed to unite the Warren summit of the Ohio State canal with the line he had traced some years before along the valley of the Shenango river, namely, the Mahoning route, when he was ordered to the Tennessee river with the view of ascertaining the most judicious plan for overcoming the obstructions to navigation already referred to. A copy of his instructions in this matter is in Mr. Burgess's hands.

Accordingly, Colonel Kearney undertook this in addition to his other duties, and having completed the field work he returned, agree

ably to orders, to Washington, to prepare his reports, &c., for the use of the board. These being soon ready, he reported them to the chief engineer, from whom came all his orders. On the succeeding day, January 15, 1830, the Secretary of War directed that Colonel Kearney should be associated with the board as a member, in preparing these reports upon the Muscle Shoals improvements. They occupied the board until March 28, 1831, when the President of the United States approved them, and this disposed of that subject for the present.

On April 27, 1831, Colonel Kearney was directed by the chief engineer to continue the preparation of the maps and memoirs relating to the surveys which had been made under his direction in the States of Pennsylvania and Ohio. These surveys are enumerated in the letter of June 4, 1828, herewith; they were amongst those that were committed to the board of internal improvement. The work relating to them was accordingly resumed at once and continued until June 10, 1831, when a reorganization of the board was effected, so that the engineer or other officer, civil or military, who had conducted the surveys relative to any project committed to the board, should be considered a member of the board during the preparation of the report on such projected work; and also, amongst others enumerated in the order, the topographical engineer, in charge of the topographical bureau.

By virtue of this regulation, Lieutenant Colonels Abert and Kearney, topographical engineers, became members of the board, and, for example, acted as such *in revising* the plans for the improvement of the Tennessee river, as may be seen by their report of November 4, 1831. A revision made in conformity with an act of the previous session of Congress. This was the final action of the board, I believe, upon the subject of the Muscle Shoals and other improvements of the Tennessee river until 1835 and 1836. Colonel Kearney, by order of the War Department, inspected that work—the same having been partly executed according to the revised plans of the board—according to his report of April 14, of the latter year.

In 1838, I believe, the board ceased to exist. An appropriation had been inserted in the Military Academy bill of the previous session of Congress to pay arrearages arising under the act of April 30, 1824. The furniture of the office of the board was therefore sold, and the office vacated on September 30 of that year.

In the message of the President of the United States, already referred to, (18th Cong., 2d sess., Doc. 32,) transmitting to the Senate the first report of the board, is a letter from the chief engineer, General Macomb. This letter may be received as the organic law of the board, fixing the compensation of its members, its rules of proceeding, &c., and referring these matters to the rules respecting the board of fortifications, of which General Bernard and Colonel Totten were then, and had been for several years, members. It is under the authority of this letter, and of the annual estimate of the expenses of the board, to be found in the same document, that I claim compensation while acting as a member of the board of internal improvements. The letter in question would seem to leave no doubt that the members of the board were, as such, entitled to certain allowances to which the

members of the board of fortifications had been entitled. But the document I am referring to, contains all the evidence I have on that point except an account of Major DeRussy, for services as temporary member of the board of fortifications, in May and June, 1821. (See Doc. 18, 28th Cong. 1st sess. H. R., War Dept.) Also the allowance of \$250 granted to Major Poussin and Lieutenant Trimble, not members, while employed upon a reconnoissance of a contemplated road between Washington and New Orleans. Messrs. Poussin and Trimble, officers of the army, being assistants to the board, occupied with duty committed by the War Department to the board.

It may be remarked that this is not the only case in which Lieutenant Trimble received enhanced pay for his services. In Doc. No. 18, 28th Cong., 1st sess. H. R., War Dept., page 64, we find that Lieutenant T. drew \$1 50 per diem, between the 2d April and the 11th June, (71 days,) for services on the Baltimore and Ohio railroad, Maryland, the work of a private company. By the same document we find that several other officers had received extra pay for similar services.

The only way in which I can account for the apparent silence of the record respecting such payments to members of the board, is this, viz: The only military members of the board of internal improvements when first organized, were also members of the board of fortifications, and for that reason entitled to the allowance in question, could not appear as recipients of the same from the appropriations under the act of 1824. But it is possible that the explanation may be concealed in some of the secret drawers of the accounting officers of the government. Certain it is, that I have often heard a loose though indefinite rumor of the members of the board being entitled to an allowance of some sort, say \$4 to \$4 50 per day.

J. K.

OCTOBER 30, 1857.

Board of Internal Improvement.

1. May 31, 1824. The chief engineer to General Bernard, Lieutenant Colonel Totten, &c., constituting them a board under the act of April 30, 1824, for internal improvement.

3 January 17, 1825. The chief engineer to the Secretary of War; estimate of funds required for the service of the board, including an allowance of \$4½ per day extra for two members (2,097) The chief engineer, General Macomb, by direction of the Secretary of War, says:

May 31, 1824. "The rules and regulations established in the prosecution of the *survey of the coast* will apply in the disbursement of the appropriations, and the compensation to be allowed the officers of the army who may be detailed for service under the act. The board will observe the same rules in reporting, from time to time, the progress made in the execution of the duties assigned to them.

The phrase "survey of the coast" in the chief engineer's letter of May 31, 1824, is intended to refer to the functions of the board of for-

tifications, which board was charged at the time with the survey of the coast in connexion with the defence of the seaboard, for which it had been drawing the requisite plans for some years previous.

J. K.

OCTOBER 30, 1857.

List, in part, of report made or participated in by Lieutenant Colonel Kearney, upon subjects committed to the board of internal improvements under the provisions of the act of 1824.

1. April 8, 1830. Report upon the improvement of the navigation of Colbert's shoals. (See vol. 59 "Roads and Canals," Doc. 167, 29th Cong., 1st sess., in the Bureau of Topographical Engineers. Plans and estimates.)

2. March 28, 1831. Report to the chief engineer, concerning the improvement of the navigation of the Tennessee, with plans and estimates. (See vol. 59, "Roads and Canals," Doc. 167, 29th Cong. 1st session.)

3. March 31, 1831. Second report upon the improvement of the Muscle shoals, with plans and estimates.

4. May 4, 1832. Survey of the route of a canal from the Ohio river to Lake Erie, in 1825, and 1826. Descriptive memoir, &c. (See "Roads and Canals," vol. 27, in the Bureau of Topographical Engineers, 22d Cong., 1st sess. H. R., War Dept. No. 239.) Also drawings of the same in the topographical bureau.

5. May 12, 1832. Survey of the route of a canal by the valleys of Conneaut and Elk creeks to the harbor of Erie, Pennsylvania, called for by resolutions of the House of Representatives, January 26, 1830, January 6, 1832, and February 23, 1832.

6. May 14, 1832. Reconnoissance of a road from Uniontown, Pennsylvania, to Pittsburg, Pennsylvania.

7. April 17, 1834. Report upon the plan of a harbor at the mouth of Elk creek, Lake Erie, with an estimate of the cost of constructing the same. (23d Cong. 1st sess. H. R., War Dept., Doc. 354, "Roads and Canals," vol. 16.) Surveyed in 1825.

8. October 14, 1834. Descriptive memoir, plans, and estimates of the cost of a canal from the Akron summit of the Ohio State canal *via* the valley of the Mahoning to Big Beaver creek, Pennsylvania. (See 23d Cong., 2d sess. H. R. War Dept., Doc. 65, "Roads and Canals," vol. 27.)

9. April 14, 1836. Lieutenant Colonel Kearney's report of inspection of the Muscle shoals improvement, under orders of May 23, 1835, the day on which he undertook the direction of the Eastern Shore railroad, under orders of April 9, of the same year.

The last act of Lieutenant Colonel K. in connexion with the board of internal improvement, was this report of April 14, but a general order of the year 1835, is said to have withdrawn all extras from officers of the army, and from him amongst the rest. If so, then the date of that order necessarily limits his claim, which must terminate with the date of the order in question.

J. K.

The preceding list is very far from comprising all the duties executed or reports made by Lieutenant Colonel Kearney, under orders, between the date of his first connexion with the board of internal improvement, March 8, 1826, and the date of the organization of his corps, viz: the time of his promotion.

J. K.

WASHINGTON, *October 30, 1857.*

DEAR SIR: I find the following memorandum amongst my papers. Will it be of any use to you?

J. K.

OCTOBER 30, 1857.

Double rations while employed on the Eastern Shore railroad. The Auditor, I think, objects to this, that the charge requires the sanction of the Secretary of War, according to the regulations of 1836, the service charged having occurred in that year.

The regulations referred to, are presumed to be those of *December 31, 1836*, which, though printed that year, were not promulgated until 1837. The succeeding edition of the regulations 1841, dispenses with the Secretary's sanction, and so do all other editions of the book. But, Colonel Kearney was ordered upon the service in question on the 9th of April, 1836, and on the 14th he took charge of the work; that is eight to nine months prior to the *date* of the regulations to which the Auditor refers. We do not admit that the regulation of 1836, so called, affects our case, and for that reason have recourse to the regulation of Mr. Robb, of September 1, 1832, which is the next preceding rule, and this I presume to be the opinion of the paymaster general, in whose office the first statement of our double ration voucher was drawn up. Should our claim for brevet pay be allowed by the court, our claim for extra rations will of course receive an increase corresponding with our increased rank.

J. K.

R. BURGESS, Esq.

Regulation.

DEPARTMENT OF WAR, *September 7, 1832.*

Each officer of the corps of topographical engineers, charged with the construction of any work, or having a separate command, shall hereafter be entitled to receive double rations, in the same manner as is allowed to officers of other arms of service, commanding separate forts or arsenals.

JOHN ROBB,
Acting Secretary of War.

I think that in your argument you make the point that *publication* is necessary to give validity to a regulation or general order. To the same effect are "General orders No. 1," dated "Headquarters of the army, Adjutant General's Office, Washington, January 6, 1853," a printed copy of which is herewith. In this order we find the following passage: "As it appears, however, that *no publication was made of the rule established by that decision*, and as some question has arisen in regard to the existing rule in the matter, the department has thought proper to give notice of it in General Orders, as follows," &c.:
J. K.

OCTOBER 31, 1857.

[General Orders, No. 1.]

HEADQUARTERS OF THE ARMY,
Adj't. Gen's. Office, Washington, Jan. 6, 1853.

The order of the War Department, in January, 1839, in relation to the allowances of the officers attending the court of inquiry sitting at St. Louis, is considered as settling the principle and rule applicable to all such cases; and upon a careful review of the law and reason of that decision, the department still considers that the order then made was correct. As it appears, however, that no publication was made of the rule established by that decision, and as some question has arisen in regard to the existing rule in the matter, the department has thought proper to give notice of it in "General Orders" as follows:

1. An officer attending a court martial and receiving the per diem compensation provided by law, is not thereby deprived of his quarters or the commutation allowance therefor at his permanent station provided by the 976th and 982d paragraphs, General Regulations, edition of 1841, and when such officer has no permanent station where he receives such allowances, he is entitled to receive them at the place where the court martial is held.

2. An officer not on duty otherwise than as attending a court martial, is not on duty there within the meaning of the 986th paragraph, of the regulations above cited, so as to deprive him of the per diem referred to in that article.

Published to the army by command of Major General Scott:

S. COOPER, *Adjutant General.*

[General Orders, No. 19.]

WAR DEPARTMENT,
Adj't Gen's Office, Washington, Nov. 12, 1855.

The following opinion of the Attorney General of the United States, in relation to the competency of a general court martial to reconsider its proceedings with a less number of members present than originally constituted the court, is published for the information and guidance of all concerned:

ATTORNEY GENERAL'S OFFICE, *July 12, 1855.*

SIR: You referred to me on the 19th of October last the proceedings of a general court martial, held at West Point, in the case of

cadets Lee and Craig, suggesting inquiry as to a specific point of law in the proceedings, and anything else material which the record may present for consideration.

I have to apologize to you formally, as I have already done informally in conversation, for having inadvertently allowed this case to lose its proper place in my attention, and thus to have remained without disposition; and I now proceed to submit, in this communication, the views which occur to me on the specific question indicated, which is this:

The court having passed sentence, and adjourned without day, was reconvened by the department to reconsider their decision. When the court reassembled, two of the members originally, present, were absent for cause not known to the court or the department. In such case are the members present competent to revise and change the former decision of the court?

I assume that the cadets of the Military Academy, as explained in my communication to you of the 11th instant, are subject to the rules and articles of war, and of course to trial by court martial.

I shall assume, also, that, no question being stated, none exists here, as to the legality of the order of the department reassembling the court and requiring it to revise its original sentence. The case finds that the court had been adjourned without day. But that, it is presumed, was in this case the act of the court only, which had no lawful power to terminate its own existence, and which adjourned without day to await the action of the department. If there had been some order of the Secretary of War, in whatever form of words, to operate as a dissolution of the court, then it would be necessary to say that it could not be convened anew as *the same court*, and of course could not take up the proceedings for reconsideration. (See Opinion of October 27, 1853, MS.) But the present appears to have been the case of a court not then dissolved by the appointing power, and of course subject to be reassembled for revising its record, as it was, by the order of the department.

The case presents, therefore, the single question, whether, when the court reassembled lawfully, two of its members being absent for whatever cause, but a legal quorum of the court appearing, it was competent to go on as the same court which had passed the original sentence, and to revise or modify it on a reconsideration of the record.

I had occasion not long since to examine the question, whether a court martial, which, having commenced a trial, proceeded in the absence of one of the originally present members, and, perhaps unlawfully, excluded such member from resuming his seat, could pronounce a valid sentence; and my opinion was, that the absence of such member, however caused, with a quorum remaining, could not affect the legality of the proceedings of the court. (Opinion of April 11, 1855, MS.)

I think it makes no difference whether the absence of a member or members happens pending the original proceedings, or on the meeting for revision. In either contingency, it is one and the same court, with unbroken continuity of existence, and unimpaired capacity on the same subject matter.

The 64th of the articles of war provides as follows :

“ General court martials may consist of any number of commissioned officers from five to thirteen, inclusively ; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.”

This law makes provisions as to the number of officers to be ordered on a general court martial, but none as to the number who must actually attend and participate in its proceedings beyond a fixed maximum. No law or regulation, which has come under my notice, requires all the members of the court who participated in the original proceedings, to continue present until the time of their conclusion. Objections to competency may diminish the original number. So may sickness, death, or the same exigencies of the service, which authorize the original appointment of a number less than thirteen. Still it is a lawful court.

It must be conceded, that of the thirteen officers who it appears were in the first instance ordered on the court, and of the twelve who heard the case in the first instance, the ten who reassembled would have been competent to try the case when originally submitted. If so, there is no good reason why they should not be competent to reconsider and revise the original decision.

This rule obtains in all civil courts, constituted of a plurality of members, where a member dies or absents himself, or a new member is introduced, without interrupting the continuity of the jurisdiction, or detracting from the legality of its final action. There is nothing in the nature of things to forbid the application of the rule to military courts.

I am aware that courts martial have many points of analogy with juries; the appointing power have something of the same relation to the former that the judge at *nisi prius* has to the latter; inasmuch as the court martial, like the jury, finds a fact and pronounces sentence thereon, which has to undergo the legal supervision of a superior authority. I have seen questions where it was convenient to reason from this analogy. It is analogy only, however, and leaves unchanged the substantial nature of things.

But reasoning from this analogy in the present case would not weaken the grounds of my conclusion. It is no inherent necessity which forbids a jury to undergo personal change in the course of a trial, or which requires it to consist of twelve men, or which makes unanimity essential to a verdict. All these are matters of positive law in the given case, and nothing more. It is arbitrary discretion in the law-maker which makes all these things essential to the legal action of a jury. Nay, the progress of improvement in jurisprudence has already given flexibility in these respects to the constitution of juries. Besides which, it is only the traverse jury to which those arbitrary provisions of positive law ever attach. The grand jury, which is just as near analogy for court martial as the traverse jury, has always consisted of members changeable in numbers and personality within certain limits, acting only by a quorum vote, without necessary unanimity.

Precedents are not wanting to show that a court martial, thus re-

assembled, can lawfully proceed notwithstanding the absence of members, provided that the number continuing present be not less than what is required for the court by the articles of war.

There is one case reported, which illustrates the point in its different aspects, (James' Collection, page 752.)

I am of opinion, therefore, that the absence of the two members at the reassembling of the court, did not impair its jurisdiction, or otherwise injuriously affect the legality of its action: and that it still remained the same continuous and competent court as when it first assembled under the orders of the department.

I have the honor to be, very respectfully,
C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

By order of the Secretary of War:

S. COOPER,
Adjutant General.

I think I have been before now able to put into Mr. Burges's hands every copy of the General Army Regulations, issued or reissued since the act of 1813, organizing the general staff, and they all show the authority on which they were founded, namely, the express authority of law or of the President of the United States. The only exception that seemed somewhat questionable to me, was the Engineer Regulations of 1840, the doubt resting on the question, *by whom were they approved?* I am told, however, that the Engineer Regulations of 1840, were taken from the General Army Regulations of 1825, wholly or in part; and they rest, therefore, on the same authority as the Regulations of 1825. Mr. Burgess has in his hands both of them, and can compare them, and then the investigation of that question will be complete.

The Ordnance Regulations of have the express warrant of law. J. K.

The nature and extent of General McComb's command, taking into view the Military Academy at West Point, and the topographical engineers, which are attached to his command, as chief of the corps of engineers, his brevet pay appears to be clearly within the meaning of the laws applicable to the case. The allowance of the pay of a brigadier general to the assistant engineer, General Bernard, is an additional reason in favor of the allowance.

JAMES MONROE.

JUNE 12, 1822.

The brevet pay and emoluments of brigadier will commence from the time that he was arranged to his present command.

J. M.

Paymaster Andrews, 2d quarter, 1822, Voucher 38. Settled August, 1826.

The above copy was compared with the original in the possession of Paymaster T. P. Andrews.

CIRCULAR.

BUREAU OF TOPOGRAPHICAL ENGINEERS,

January 3, 1842.

SIR: The following decision of the Secretary of War, officially communicated by the Adjutant General in his letter of the 3d inst., is transmitted for your information and government.

Respectfully, sir, your obedient servant,

J. J. ABERT,

Colonel Corps Topographical Engineers.

Lieut. Col. KEARNEY,

*Corps of Topographical Engineers.*WAR DEPARTMENT, *December 30, 1841.*

I have considered carefully the communications of the colonel of topographical engineers, and of the colonel of the engineer corps, upon the subject of the appropriate duties of those corps respectively, and have come to the following conclusions:

I. Both corps are undoubtedly *military* in the strictest sense; the officers of each have military rank, and are subject to the Articles of War. Certain duties, which fall under the denomination of "civil engineering," such as the improvement of roads, harbors, and rivers, are more appropriate to the topographical corps, while other duties, relating to fortifications, &c., more properly belong to the corps of engineers. While this general rule of distribution of service is recognized, the department reserves to itself the employment of the officers of either corps in duties not within the rule, whenever circumstances shall require it.

II. I think the range of duties of each corps, and the boundary between them, is as well expressed by the existing regulations (No. 858 and No. 878) as they could be by any language that I could employ, excepting an apparent discrepancy between the expression, in No. 858, "surveying for military purposes," and the language of No. 878, which assigns to the topographical corps the duty of "surveys for the defence of the frontier." By inserting in this regulation the word "preliminary" before "surveys," the whole difficulty will be obviated, and the object of the organization of the two corps will be effected. These preliminary surveys, with a view to determine on the advantages of any particular work, seem very appropriate to the topographical corps, while a more minute examination and survey, to determine the exact position of the proposed work, in reference to its construction, would fall within the duties of the other corps. Such alteration is hereinafter made accordingly.

III. In reference to the works for the improvement of rivers and harbors, mentioned in Colonel Totten's letter of February 25, 1841, to Mr. Poinsett, after a careful examination of the different laws referred to, I cannot find in them any thing which prescribes the particular corps of engineers by which the works are to be performed, excepting, perhaps, the improvement of the Cumberland road; although I doubt even as to that. Considering all the others within

the discretionary power of the President, and believing that the peculiar reasons, if any, for continuing them in charge of the engineer corps have ceased, and that this corps has now, or will soon have, full employment within the rule above mentioned, I think it advisable that the following works should be transferred to the charge of the officers of the topographical corps; and such transfer is directed accordingly, viz:

1. Ohio and Mississippi rivers between Pittsburg and New Orleans.
2. Arkansas river.
2. Upper Mississippi, from St. Louis, in Missouri, to Galena, in Illinois.
4. Missouri river.
5. Improvement of Mississippi river at St. Louis, (St. Louis Harbor.)
6. Ohio river, above the Falls.
7. Light-house on Flynn's Knoll.
8. Improvement of the Red river, and Hudson river.

Regulation No. 878, in article 75, is hereby amended, by inserting the word "preliminary" before the word "surveys," in the first line, so that it will read—"The duties of the corps will consist in preliminary surveys for the defence of the frontiers, inland, and Atlantic, and of positions for fortifications," &c.

J. C. SPENCER.

IN THE COURT OF CLAIMS.

No. 602.—TRIALS No. 58.

JAMES KEARNEY, *vs.* THE UNITED STATES.

Solicitor's Brief.

The petitioner is an officer of the army, a lieutenant colonel in the corps of topographical engineers, which was created by the act of July 5, 1838. Previous to that date he was one of three topographical officers authorized by the act of April 4, 1816.

The claim consists of six items—

1st Item. *Difference between the pay of major and that of lieutenant colonel* from April 29, 1826, to July 6, 1838.

The military history of the topographical officers will be found in the following statutes:

Sec. 1, act of March 3, 1813, (2 Stat., 819,) creates these offices.

Sec. 3, same act; fixes rank and pay.

Sec. 1, act of March 3, 1815, (3 Stat., 224,) abolishes them.

Sec. 1, act of April 24, 1816, (3 Stat., 297,) re-establishes them.

Sec. 9, same act, fixes pay and rank.

Sec. 3, act of March 2, 1821, (3 Stat., 615,) retains them.

Sec. 3, act of July 5, 1838, (5 Stat., 256,) organizes them into a corps.

The petitioner was appointed in 1816, under the act of that year, with the *brevet rank* of major, and having served ten years, was, under

section four of the act of July 6, 1812, promoted in 1826 to be lieutenant colonel by brevet; on that day of July, 1838, he was made lieutenant colonel in the new corps.

The act of 1816, by reference to the act of 1813, gives topographical engineers the pay of major of cavalry. Such was the pay drawn by the petitioner as topographical engineer before his promotion to be lieutenant colonel by brevet, and he continued to draw the same afterwards and until he was made a full lieutenant colonel in the corps.

The act of April 16, 1818, (3 Stat., 427,) allows to brevet officers the pay and emoluments of their brevet rank, when on duty and having a command according to their brevet rank, and at no other time, and the present claim must be founded on the allegation he was on duty and had a command according to the rank of lieutenant colonel.

What are commands according to the various grades of rank in the army are not defined by law, but are defined by regulations. These regulations are not set forth by the petition. I refer to my brief on Rufus L. Baker's case for these regulations, and for reasons to show why neither the law nor the regulations embrace officers doing such duty as the petitioner performed. What duty he performed is shown by colonel Abert's letter of June 11, 1851.

2d Item. *Double rations* from April 15, 1836, to March 31, 1837. This claim in the petition is for a longer period, but on trial is reduced to the period just stated.

It is founded on a regulation of September 1, 1832, which allows double rations to officers in charge of the construction of any work or having a separate command.

During the period charged for, the petitioner was employed in making a survey for a railroad on the Eastern Shore of Maryland.

He was not engaged on construction, nor had he a command. Command is a military term, and does not apply to the species of control exercised by a railroad engineer over his employees. The use of the term in the regulation confines that branch of it to military employments.

This regulation was repealed by the general regulations of the same year, cited for petitioner, which confines the allowance to officers on military works, &c.

The railroad company were to pay all expenses. Such was the regulation adopted by President Jackson as a condition on which such companies should have the services of military officers, and so it is stated in the letter of the department to the petitioner assigning him to this duty. Any increase of an officer's allowances by reason of his being on this work would be an expense incident to the work, which the company should have paid, and must be presumed to have paid in accordance with their agreement.

Turnbull's case, cited for petitioner, is no precedent for the allowance of this claim. Many circumstances are recited in the decision of Mr. Poinsett allowing that claim which do not exist in this. The work was in this District, over which Congress has exclusive jurisdiction, and the government had such interest in the work as to have

made large grants of money to carry it on ; moreover the work was technically a "construction" within the terms of the regulation.

No single case decided by a department can be properly considered as a precedent for the allowance of a claim by this court. The only weight a case so cited could have, is as showing the construction placed by the proper officers on the statute or regulation, but no single case can answer this purpose. If all decisions of the Executive were accessible, as are the opinions of courts of law, we might then allow cases cited the same weight ; but such is not the case, and the decisions of Mr. Poinsett, in Turnbull's case and other cases cited from Report 263, should, from the circumstances under which that report was made, be entitled to no weight whatever. Mr. Poinsett was an officer of extremely liberal views. The administration under which he held the post of Secretary of War had been denounced throughout the country, especially for extravagant and lavish expenditure of public money. The opposite party came into power ; committees were raised in Congress to seek out the errors and abuses of the late administration, and these allowances by Mr. Poinsett were drawn forth and published by one of these committees in the report which the counsel for the petitioner cites here.

The authority of the department to allow double rations is derived from the fifth section of the act of March 16, 1802, (2 Stat., 132.) That act contemplates only commanders of separate posts, and it is proper in construing the regulation to bear the statute in view.

3d Item. *Allowance for forage undrawn* from May 1, 1816, to June 30, 1820, viz : for four horses May 1, 1816, to July 31, 1819, and two horses Aug. 1, 1819, to June 30, 1820.

This claim is founded on the act of April 24, 1816, Sec. 12, (3 Stat. 297,) which allows officers entitled to forage a commutation of \$8 per month for each horse not exceeding the number authorized by existing regulations, "provided that neither forage nor money shall be drawn by officers but for horses actually kept by them in service."

The petitioner has not shown what number of horses the then "existing regulations" allowed. The act of 1816, sec. 9, fixed the pay and allowance of topographical officers by reference to the above cited act of 1813, sec. 3, which gives them the pay, &c., of majors of cavalry, and this seems to be ascertained by the act of April 12, 1808, sec. 4, (2 Stat. 481,) giving majors of cavalry forage for four horses, provided those officers "furnish their own horses and accoutrements and actually keep in service the aforesaid number of horses."

The petitioner does not aver that he kept the aforesaid number of horses in service, nor would he certify that he did so when on his own certificate this demand would have been paid. On the contrary, he has in effect admitted that he did not keep them, and in the following manner. The officers of the army are generally furnished with blanks for their monthly accounts ; in these blanks are printed every item that can come into an officer's account, and a certificate of all the facts which are necessary to entitle the officer to draw the several allowances. On the accounts are printed an item for forage for a blank number of horses and a certificate that the officer actually kept in service the number of horses charged for. If the officer is

not entitled to any such allowance, he leaves it blank or strikes it out. The petitioner, in filling up such accounts, has made no charge for forage ; but, on the contrary, has in some instances stricken the printed item out of the account. See Auditor's letter of June 5, 1855.

He proves now that two horses were kept at his residence in Washington, and used by his family, his brothers and sisters. This is clearly no proof of keeping the horses in service. It may be, and it is very difficult to say what facts would constitute a keeping of horses in service. The department left the facts to be ascertained by the officer's own certificate in his monthly accounts. That the officer declined at the time and persistently declined for more than thirty-five years to allege the facts necessary to enable him to draw this allowance, should be conclusive against him, even if he were willing now to make the allegation, but this he still does not do. It is clearly competent for the department, before paying allowances which are conditional, to require the claimant, who alone has knowledge of the facts, to say whether the contingency has happened, and an officer who refuses to allege the necessary facts is not entitled to recover.

His evidence only goes to show the keeping of two horses ; he demands allowance for four for all the time except eleven months, when he claims for two only, having received at the time from the department the allowance for two others.

4th Item. An allowance of \$1 50 per day from April 14, 1836, to April 16, 1839, under regulation of July 16, 1836.

The history and terms of this regulation are contained in the series of letters and decisions. On the 16th of July, 1836, the chief engineer recommended to the Secretary that a per diem allowance, in addition to his allowance for fuel and quarters, be made to each of (1st) the engineers officers and (2d) the officers of the army associated with them, when engaged (1st) on several works, or (2d) on an extended line of improvement ; the allowance being for necessary expenses incurred by reason of the officer in either case having no permanent station, or being frequently called away from it.

On the same day the Secretary made a report to the President on this request, and recommended the allowance with modifications. 1st. He confined it to officers of the engineer corps. He speaks of them alone, and recommends it on grounds which apply to them alone, i. e. "the limited number of experienced officers of the engineer corps," and "their expenses." 2d. He makes no certain rate of allowance, but fixes a maximum of \$1 50 per day. 3d. He grants it "to no officer not superintending more than two works."

The President approved the recommendation, with the further condition that it be paid "upon an account and proper vouchers for the extra expense incurred being made out."

The idea of the President was, that the officer must show that he actually incurred extra expense beyond his allowance for fuel and quarters. But I have no doubt this was never regarded, and the officer, as stated by petitioner's counsel, was considered entitled to the maximum, whether he incurred expense or not, if he came within the description of the Secretary's recommendation.

The petitioner did not come within that description.

1st. He did not superintend more than two works. (See Colonel Abert's letter of June 11, 1851.) In fact he did not superintend more than one, and that one, for a part of the time, was the Eastern Shore railroad, under a private company, who had agreed and were bound to pay all expenses, and the petitioner was so informed.

2d. The petitioner was not an officer of the engineer corps. To cure this defect, however, he relies upon an order of Mr. Secretary Poinsett, May 13, 1840, directing that the regulation be construed as including both corps of engineers from its date. This order was made long after the service of the petitioner was rendered and completed, and if it have the operation contended for by the petitioner, it can only be because the Secretary of War can direct the Treasury officers and his own successors, and this court how to construe all the regulations that have ever been made by all his predecessors in the department. If Mr. Poinsett had, in acting upon claims presented under the regulation of July 16, 1836, construed that regulation to include topographical officers, his decision would be entitled to such respect as is due to the acts of officers charged with the execution of that regulation; but even then such decision would only aid the court in arriving at a correct interpretation of the regulation in question. But it clearly was not competent for the Secretary, by the order of May 13, 1840, to rule the interpretation of the regulation of his predecessor, and make it conclusive on this court.

As regards the terms of the order of May 13, 1840, which applies the regulation of July 15, 1836, to the two corps of engineers *from its date*, I will only say that there was no *corps* of topographical engineers at the date of the regulation, nor until July 5, 1838. The topographical engineers were three in number, and when the petitioner rendered this service, he and one other were serving under the orders of the third, who was stationed at Washington under the immediate direction of the Secretary of War.

5th Item. Allowance of \$4.50 per day as a member of the board of internal improvement under orders of January 15, and June 30, [10] 1830.

A board of internal improvement appears to have existed in January, 1830; how constituted, with what duties and with what compensation, is nowhere shown. The petitioner says it was the same board with different members, constituted by an order of May 31, 1824, and that to this board the allowance in question was given. The order of May 31, 1824, was addressed to three persons, and constituted them a board to make a report to the next Congress on a canal route from the Potomac to Lake Erie. In this order, or rather letter of instructions, the board are told that certain officers will be detailed and report to the board for orders, and that "the rules and regulations established in the survey of the coast will apply to the disbursement of the appropriation and the *compensation to be allowed to the officers of the army who may be detailed for service under the act.*"

The part italicized is so marked in the copy which the petitioner produces, as the part relied on by him.

These "rules and regulations," the petitioner says are found in an order of Secretary Calhoun of May 12, 1818, which allows "the offi-

cers who composed the board of engineers" "\$4.50 a day in lieu of fuel, quarters, transportation and the per diem allowance for reconnoitering."

The first thing that appears here is that the allowance is conditional, it being optional with the party entitled, to continue to receive his various allowances, or to give them up and take the gross sum. The petitioner admits that he drew his allowances, but offers to refund them and draw his per diem. I submit it is too late now to do this.

The order of 1824 gives no compensation to any member of the board thereby appointed. The compensation it speaks of is for the officers who may be detailed.

The order of May 12, 1818, does not answer the description given in the order of 1824, of the "rules and regulations" therein referred to. It contains three paragraphs: one I have just cited; another makes an allowance to the chief engineer for fuel, quarters, &c.; and the last commutes the quarters and fuel of the assistant to the chief engineer; that is all. It contains no rules and regulations for the survey of the coast, or of anything else; nothing about the disbursement of any appropriation, and nothing which could possibly apply to the compensation of officers detailed for service under order of the board. The petitioner is so clearly mistaken in supposing the order of 1824 referred to this order of 1818, that it is almost useless to go further. Moreover, it does not appear that any one of the members named in the order of 1824 ever received the per diem. I have sought in vain for any evidence of this, and the petitioner in his written argument, seems to admit that they never did, and strives to explain why they did not.

If this board was kept up beyond the time limited in the order, as the petitioner says, and new members appointed, it would depend entirely on the terms of the orders continuing the board and appointing the new members, whether the allowances should be continued. Because the War Department, in 1824, chose to allow General Bernard \$4 50 per day in lieu of *his* quarters, fuel, &c., while on a certain duty, it does not follow that it meant to give Major Kearney the same commutation for *his* quarters, fuel, &c., though engaged on the same species of duty.

The order associating the petitioner as a member of the board says nothing of any allowances to be made to him.

But the board which the petitioner actually served with was organized, not by the order of 1824, but by the order of June 10, 1830, [June 30 in the petition.] This order is entirely silent as to allowances.

Now as to the time of service: The petitioner charges continuously from the 30th of June, 1830, to 14th April, 1836—more than six years.

The letter which he produces as constituting him a member of the board (January 15, 1830,) associates him as member only while the board were preparing their report on the improvement of the Tennessee river; the petitioner having surveyed the river, could give the board important aid in devising plans of improvement.

The letter says: "In order that the board may avail itself of your personal knowledge in relation to this subject, the Secretary of War

directs that you be associated as a member of the board in preparing *their* report." The regulation of June 10, 1830, says: "The engineer or other officer, civil or military, who may have conducted the surveys relative to any project submitted to the board, will be considered a member of the board during the preparation of the report on such projected work, and for that purpose only." The petitioner does not pretend that he was ever constituted a member of the board otherwise than in the capacity of an officer who had made the surveys for works under consideration by the board, and consequently, if he was a member for six years, (and, as he says, until the board was abolished,) the board must have been, during the whole remainder of its existence after January 30, 1830, engaged in preparing reports on works which the petitioner alone had surveyed. He makes no attempt to show how long the board was actually engaged in preparing reports on works surveyed by him.

The manner in which this claim is stated and brought forward deprives it of the weight which, in a large majority of cases, is due to the mere allegations of the petitioners themselves, when they set forth clearly and fully the facts on which their demands arise, and state explicitly on what grounds they rest their claims.

The petition in this case has been framed as a kind of drag-net, to give the petitioner a chance of catching anything which, under any possible view of the case, may be allowed. Double rations are claimed for five years and eight months; but the evidence from the department shows that petitioner received double rations for all this period, except a short time—less than one year. He claims allowance for keeping four horses in service, and asks this court to find that he did keep them in service, while he himself refuses, and has always refused, to allege that he did keep them in service, although by making a certificate of that fact he could have had this claim paid by the department.

The per diem allowances claimed he has never thought proper to demand at the proper department. One of \$1 50 per day is clearly not within the regulation under which it is claimed, and the claim of the other of \$4 50 per day, as member of the board of internal improvement, is founded on what the petitioner himself, in written argument, calls "a loose though indefinite rumor of the members of the board being entitled to an allowance of some sort, say \$4 to \$4 50 per day."

As for the allegation in the petition that the failure to present his claims within a reasonable time was owing to his ignorance of his rights consequent upon his long absence from the seat of government, I will venture to say, judging from the papers produced here, that he has spent more time in Washington than nine-tenths of the officers of the army. He pleads ignorance of the "changes made from time to time in the regulations of the departments, and arising from the decisions in the courts of law." No decision of any court of law has been cited here. If there be any, he has left this court in ignorance of it. His claim for brevet pay is founded on a statute which he, in common with every officer of the army, is presumed to have known, and unquestionably did know, as soon as it passed. His claim for

double rations is founded on a regulation under which he appears to have drawn them regularly from its date for more than three years, up to the time when this claim accrued. His claim for forage is founded on a statute under which he commenced to draw his full allowance as early as 1820, and has drawn it ever since. The same act and the same section gives him his monthly pay, and he could not well be acquainted with one part of the act without knowing all that concerns him. As for his claims for per diem, if he was ignorant of the regulations respecting those allowances, it was only because they do not at all concern him.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

MAY 31, 1859.

JAMES KEARNEY *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The petition, after stating that the claimant held the brevet rank of lieutenant colonel in the corps of topographical engineers in the United States army from the 29th of April, 1826, presents his claims as follows :

1. For the difference of pay and emoluments between those of a major and lieutenant colonel from the 29th of April, 1826, to the 6th of July, 1838, inclusive, during which time he was in charge of and was directing the operations of parties in the field at separate and distinct places ; his command being equal to that of a lieutenant colonel of his corps, performing similar services, and of equal responsibility, embracing as important and extensive duties as those of other officers of the same corps, \$3,084.

2. For double rations, under the regulations of the War Department in relation to such matters, from April 15, 1836, to March 31, 1837, \$280 80.

3. For forage as major, from May 1, 1816, to June 30, 1820, undrawn, for the number of horses to which he was entitled according to his rank, in pursuance of the laws and regulations of the army, \$1,424:

4. For his per diem allowance, in addition to the usual allowances for quarters and fuel, authorized by the regulation of the Secretary of War, sanctioned by the President, dated July 16, 1836, while engaged upon extended lines of improvement in connexion with the Eastern Shore railroad, &c., 1,098 days, at \$1 50 per day, \$1,647.

5. For per diem allowance as a member of the board of internal improvement, under the orders of the War Department of the 15th of January and the 30th of June, 1830, in relation to the improvement of the Muscle shoals, &c., 2,266 days, at \$4 50 per day, \$10,197, subject to certain deductions.

The petition further states that the claims for brevet pay, double rations, and forage, have been disallowed at the department.

We will examine these claims in the order in which the petition presents them.

1. The claim for the difference between the pay and emoluments of a major and those of a lieutenant colonel.

The claimant, Lieutenant Colonel Kearney, was commissioned on the 16th of September, 1816, a topographical engineer, which gave him the brevet rank and the pay and emoluments of a major of cavalry. (2 Stat. at L., 819, § 3; 3 Stat. at L., 297, § 9.) Afterwards, the rank of lieutenant colonel by brevet in the army of the United States was conferred on him, to rank as such from the 29th of April, 1826. (See his commission among the papers.) On the 7th of July, 1838, he was appointed a full lieutenant colonel. The claimant has received the pay and emoluments which were at any time due to him as a major of cavalry; but he contends that whilst he was a lieutenant colonel by brevet, that is, from the 29th of April, 1826, until the 7th of July, 1838, he was entitled to the pay and emoluments of a lieutenant colonel. This claim, therefore, is for the difference, during that time, between the pay and emoluments of a major and of a lieutenant colonel.

The following are the facts:

The claimant, being a topographical engineer, was employed during the most of said time in performing his duties as such engineer. The manner in which he discharged those duties in each of the years aforesaid is shown by the following letter:

“ BUREAU OF TOPOGRAPHICAL ENGINEERS,
“ *Washington, June 11, 1851.*

“ SIR: In reply to your letter of the 12th of February last, requesting, as the agent of Lieutenant Colonel James Kearney, to be furnished with a statement of his services between the 29th of April, 1826, and the 7th of July, 1838, when he was made a full lieutenant colonel, I have to state that, during the period referred to, he was in command of a party of engineers, and executed the following surveys, viz:

“ In 1826, survey of a canal route from Pittsburg to Lake Erie, by the valleys of the Ohio river, Big Beaver, Chenango, and Conneaut creek, to Elk creek, and the reconnoissance of a road to connect the Cumberland road with the Black Swamp road in Ohio.

“ In 1827, survey of two lines of canal in continuation of the French creek route, by the Waterford summit, to Lake Erie, and an embranchment of the Ohio and Erie canal from Elk creek to Presque Isle; survey of a canal route from the head of Big Beaver, by the valley of the Mahoning river, to the Akron summit of the Ohio State canal, and the survey of the Alleghany river and French creek.

“ In 1828, survey of a canal route from the head of Big Beaver, by the valley of the Mahoning river, to the Akron summit of the Ohio State canal; survey of the Alleghany river with a view to its improvement for slack-water navigation; reconnoissance of a road from Uniontown, Pennsylvania, to Cleveland, on Lake Erie, and examination of a proposed route for a road from Hancock, Maryland, to the Pennsylvania turnpike.

"In 1829, survey with a view to the improvement of the navigation of the Tennessee river at the Muscle shoals and Colbert's shoals; survey of the Tennessee river within the State of Alabama; location of a line of canal from near the head of Hurricane shoal, by the right bank of the Tennessee river, to Florence; and survey and levelling of the plane of greatest depression of the plains of Courtland, from the mouth of Mallet's creek to Town creek.

"In 1830 and 1831, reconnoissance of the sounds of North Carolina; military survey of St. Mary's river and its vicinity, in Maryland; survey of the Ohio, Beaver, and Chenango route of the Ohio and Erie canal, from Pittsburgh to Elk creek, on Lake Erie, and to the harbor of Erie; survey of the Alleghany river, from Pittsburgh to French creek; of French creek to Le Bœuf, and of a route of a canal thence to the harbor of Erie; survey of the Pennsylvania and Ohio canal, from Big Beaver river to Akron, in Ohio; reconnoissance of roads in Pennsylvania and Ohio, with a view to the prolongation of the Cumberland road to Cleveland and to the Black Swamp road.

"In 1832, preparing reports and maps of surveys executed in 1831; engaged upon the subject of the Potomac bridge, under instructions from the Treasury Department; and in charge of the bureau of topographical engineers from 6th October until 27th December.

"In 1833, survey of the Potomac river, within the District of Columbia.

"In 1834, survey with a view to the construction of a harbor at the entrance of Elk creek, Erie county, Pennsylvania; survey and location of a canal to connect the Waggamaw and Cape Fear rivers, in North Carolina, and location of that part of the Winchester and Harper's Ferry railroad which passes through the public grounds at Harper's Ferry.

"In 1835, survey of the Susquehanna river, and inspection of work done for the improvement of the navigation of the Tennessee river, in the vicinity of Florence, Alabama.

"In 1836, survey of a route for a railroad on the Eastern Shore of Maryland.

"In 1837, survey near the coasts of North and South Carolina.

"In 1838, preparing maps, charts, and reports of his surveys near the coast of North Carolina until 7th July.

"It is believed that the foregoing statement embraces all the field duties under the immediate supervision of Colonel Kearney within the time referred to.

"Respectfully, sir, your obedient servant,

"J. J. ABERT,

"Colonel Corps of Topographical Engineers."

"R. BURGESS, Esq.,

"Washington."

There are likewise two certificates of Colonel Abert on this subject, one of which is as follows:

"This is to certify that, during the period of the within account, [present claim,] Brevet Lieutenant Colonel James Kearney directed the operations of surveying parties at the same time, at separate and

distinct places, as appears from the records of this office, namely, from the 29th of April, 1826, to and inclusive 6th July, 1838; that his command for said time was equal to that of lieutenant colonel of the corps, performing similar services of equal responsibilities, embracing important and extensive duties. His claim for brevet pay during that time seems to me to come within established precedents in similar cases.

“J. J. ABERT,
“Colonel Corps Topographical Engineers.

“BUREAU TOPOGRAPHICAL ENGINEERS, September 27, 1854.”

The other certificate of Colonel Abert is as follows:

“I certify that the representation of Lieutenant Colonel James Kearney of his command during the time stated is correct, and that, in conformity with decisions of the War Department in analogous cases, he is entitled to his brevet pay.

“J. J. ABERT,
“Colonel Corps Topographical Engineers.

Lieutenant Colonel Kearney's statement of his command, referred to in the certificate last above mentioned, is as follows:

“I hereby certify * * * * that for the whole time brevet pay is claimed I was on duty, and had a command, according to my brevet rank, agreeably to law and regulations; that I was actually in the command of a company for the whole time additional pay is charged.”

It also appears that under a letter of the 15th of January and an order of the 10th of June, 1830, Lieutenant Colonel Kearney was authorized to assist the board of internal improvement, as a temporary member, in making reports of certain surveys, and there are some reports of surveys signed by him as a member of the board.

The facts to be collected from the foregoing statements are, that during the time specified in the petition Lieutenant Colonel Kearney was a topographical engineer, and employed in the performance of his duties as such engineer in making surveys, reports thereof, &c., and in assisting in preparing some reports of the board of internal improvement as a member, for the time being, of such board, except for a short period when he had charge of the Bureau of Topographical Engineers. During the whole of the time for which this brevet pay is charged, that is, from the 29th of April, 1826, till the 7th of July, 1838, except as aforesaid, he was in command of a party of engineers, but the number of the party is not stated.

We are next to examine whether those facts bring the case within the act of Congress of 1818 on the subject of brevet pay, and within the army regulations of 1825 and 1836 on the same subject, so far as those regulations are in accordance with said act of Congress.

The act of Congress of 1818 says: “That the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty, and having a

command according to their brevet rank, and at no other time." (3, Stat. at Large, 427.) The army regulations of 1825 say: "Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank; for example, a brevet captain must command a company; a brevet major and a brevet lieutenant colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier, a brigade; a brevet major general, a division." The army regulations of 1836 are as follows: "Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments when on duty under the following circumstances: a brevet captain, when commanding a company; a brevet major, when commanding two companies, or when acting as major of the regiment; a brevet lieutenant colonel, when commanding at least four companies, or when acting as lieutenant colonel of the regiment; a brevet colonel, when commanding nine companies of artillery, or ten of infantry or dragoons, or a mixed corps of ten companies, or when commanding a regiment; a brevet brigadier general, when commanding a brigade of not less than two regiments or twenty companies; a brevet major general, when commanding a division of four regiments or at least forty companies.

"A brevet officer, when assigned by the special order of the Secretary of War to a particular duty and command, according to his brevet rank, although such command be not in the line, provided his brevet allowances are authorized in the order of assignment.

"To entitle officers to brevet allowances while acting as field officers of regiments according to their brevets, they must be recognized at general headquarters as being on such duty, and the fact announced accordingly in general orders." (See these regulations, in 3 Howard, 559, 560.)

It appears to us that, according to the facts of this case, the claimant was not, during any part of said time, within the provisions of said act of Congress, nor within any of said army regulations. To entitle him to recover in this part of the case, he was bound to prove that during said time, or a part of it, he was on duty, and having a command according to his brevet rank, which rank was that of a lieutenant colonel in the army of the United States; and to show also that such command had devolved on him by law, or had been assigned to him by the President of the United States. There is certainly no such proof. The claimant did nothing, nor had he anything to do, that required the action of a lieutenant colonel of the army; and why, then, should he receive the pay due to such an officer? If he can recover the brevet pay in question, it is upon the principle that a brevet officer, without a military command according to his brevet rank, may be entitled to brevet pay. But there is no such principle.

On the 9th of November, 1850, this claim for brevet pay was presented to Mr. Clayton, the Second Auditor of the Treasury, and was rejected. An appeal was taken to the Secretary of War, Mr. Conrad, who also rejected the claim. His decision is as follows:

“WAR DEPARTMENT, *January 14, 1854, [1851.]*

“Owing to the nature of the duties of topographical officers, their claims for brevet pay under the act of 1818 must always present questions of difficulty. In the present case, I see nothing to show that the duties of Lieutenant Colonel Kearney were not as appropriate to the rank of major as that of lieutenant colonel. The application is rejected.”

In September, 1854, Lieutenant Colonel Kearney, again presented his said claim to Mr. Clayton, with a request, should his decision be adverse, to report it to the Second Comptroller for his decision thereon. Mr. Clayton having rejected the claim, sent the case to Mr. Brodhead, the Second Comptroller, who replied, October 3, 1854, that, as the Secretary of War had rejected the claim, it would be indecorous for the accounting officers to review the decision. He added, however, that in the justice of Secretary Conrad's decision he entirely concurred.”

Afterwards, on the 21st of November, 1854, a new Secretary of War having been appointed, namely, Mr. Jefferson Davis, application was made to him to allow the claim; but the claim was again rejected. The following is the decision of Mr. Secretary Davis:

“WAR DEPARTMENT,
“*Washington, May 5, 1855.*

“SIR: I have considered your claim for brevet pay, presented on the 25th of November last, and transmit you a copy of my decision thereon as follows:

“I do not see that the duty performed by Lieutenant Colonel Kearney was according to his brevet rank; nor had he that military command which is necessary, in the view of this department, to entitle an officer to brevet pay.

“Very respectfully, your obedient servant,

“JEFFERSON DAVIS,
“*Secretary of War.*

“Lieutenant Colonel JAMES KEARNEY,
“*Corps Topographical Engineers, Washington.*”

We are of opinion that the claim in this case for brevet pay and emoluments is without foundation.

The second claim stated in the petition is for double rations, under the regulations of the War Department in relation to such matters, from the 15th of April, 1836, to the 31st of March, 1837.

During the period just mentioned the claimant, as before said, was a topographical engineer, with the brevet rank and the pay and emoluments of a major of cavalry. (2 Stat. at Large, 819; 3 id., 298.) On the 9th of April, 1836, he received from Lieutenant Colonel Abert, of the Topographical Bureau, a letter, as follows:

“SIR: As soon as you have completed the report of the duty assigned to you in the orders of this bureau of the 23d of May last, you will call on Littleton Dennis Teakle, esq., and inform him

that you are ready to take in charge the survey for which he has applied.

“Mr. Teakle is one of the commissioners on the part of the State of Maryland for the purpose of superintending the survey of the route for a railroad on the Eastern Shore of Maryland. He has applied for a chief engineer to superintend the work, and you are hereby assigned to that duty. The route which the railroad is to pursue is generally pointed out by a resolution of the General Assembly of Maryland, passed during its last session. But upon these matters you will take the direction of the commissioners.

“As all the expenses of the survey are to be supplied by the State, you will address your estimates for these, and for the assistant engineers and instruments required, to Mr. Teakle, who represents the Board of Commissioners and is authorized to make all necessary arrangements.”

The letter of the 11th of June, 1851, from Colonel Abert to Mr. Burgess, copied in a previous part of this opinion, states that between the 29th of April, 1836, and the 7th of July, 1838, the claimant was in command of a party of engineers and executed various surveys, and describes one of those surveys as follows:

“In 1836, survey of a route for a railroad on the Eastern Shore of Maryland.”

Those two letters of Colonel Abert contain all the evidence we have as to the employment of the claimant during the time for which the claim for double rations is made.

The first act of Congress giving double rations was passed in 1797. That act provides as follows: “That to the brigadier, while commander-in-chief, and to each officer while commanding a separate post, there shall be allowed twice the number of rations to which they would otherwise be entitled.” (1 Stat. at Large, 507, sec. 4.) By that act any officer having the command of a separate post was entitled to double rations. Another act on the subject was passed on the 16th of March, 1802, as follows: “To the commanding officers of each separate post such additional number of rations as the President of the United States shall from time to time direct, having respect to the special circumstances of each post.” (2 Stat. at Large, 134, sec. 5.) This act of 1802 gives additional rations to no other person than the commanding officer of a separate post; so that if the present claim for double rations rested alone on said act of 1802, it would fail, because there is no proof that the claimant was, at any time, the commanding officer of a separate post.

But the claimant relies on the following order from the War Department:

“DEPARTMENT OF WAR, *September 1, 1832.*

“Each officer of the corps of topographical engineers charged with the construction of any work, or having a separate command, shall hereafter be entitled to receive double rations, in the same manner as is allowed to officers of other arms of the service commanding separate posts and arsenals.

JOHN ROBB,
Acting Secretary of War.”

In construing this order it must be borne in mind that its validity depends on its being consistent with said act of Congress of 1802. That part of the order which speaks of the construction of any work must be confined to military works, and the other part, which speaks of a separate command, must be construed to mean a military command, in order that neither of those parts may conflict with said act of Congress of 1802. But the claimant's having the charge of the survey of a route for a railroad of a State, and the command of the surveying party on that route, did not bring him within said order of Acting Secretary Robb, according to its proper construction.

The claimant relies on the decision of Mr. Poinsett, Secretary of War, allowing, under said order of 1832, double rations to Captain Turnbull whilst superintending the Potomac aqueduct; but that decision, on its face, shows that Mr. Cass, Secretary of War, and Mr. Butler, Secretary of War *ad interim*, had both previously decided that the said order applied only to public and strictly military works. (Report No. 263, 27th Congress, 2d session, p. 34.) It is very clear that the railroad in question was not a public and strictly military work.

The claimant remained silent as to this claim for about nineteen years. It was presented to the Second Comptroller in 1855. The following is his opinion: "With regard to that part of the claim referring to double rations, I do not conceive it competent for the accounting officers to admit the same without the express sanction of the Department of War. The decision of that department of July 21, 1837, in case of the claim of Captain Turnbull, referred to in the papers before me, is not *general*, nor intended to govern in other (though precisely analogous cases,) but is specific and express, regarding Captain T.'s claim only, and in no way applicable to that of Lieutenant Colonel Kearney's. Without the sanction of the proper officer of that department, his claim as above cannot be allowed." So that the Second Comptroller, notwithstanding said order of the acting Secretary of War in 1832, and the decision in Turnbull's case, rejected this claim, and we think his decision is correct.

The third claim stated in the petition is for forage. The account filed by the claimant is as follows:

The United States to James Kearney, major topographical engineers, Dr.

June 30, 1820. To this amount due me for forage, four horses, from May 1, 1816, to June 30, 1820; inclusive, being fifty months, at \$8 per month for each horse.....	\$1,600
Deduct from the above the commuted value of the forage furnished in kind by the Quartermaster's department between the 1st of August, 1819, and the 30th of June, 1820, viz: for two horses for eleven months, at \$8 per month.....	176

1,424

The acts of Congress in force during said period allowed a topographical engineer forage for four horses, or eight dollars a month

for each horse, provided that neither forage nor money should be drawn by officers but for horses *actually kept by them in serviee*. (See 2 Stat. at Large, 482 ; id., 819 ; 3 id., 299)

The claimant was a topographical engineer during said period, and the inquiry to be made is, whether during that time, or any part of it, he actually kept four horses, or any less number, in service, for which compensation was not received?

This claim was presented to the department for the first time in 1855, which was between thirty and forty years after it is alleged to have become due. The accounting officers rejected the claim. When, in a case like the present, such a great lapse of time has accrued without any demand having been made, and no good excuse is shown for the delay, the lapse of time is a serious objection to the claim. But passing by that objection, there is no sufficient evidence of the claim. The only evidence offered is two *ex parte* affidavits, both made thirty and forty years after the time to which they refer. One of the affiants says that within the period from 1816 to 1820 he was a near neighbor to the claimant, and has a perfect recollection of a small horse or pony kept and used by the claimant's family within or about that time, and that the claimant was much absent from home. The other affiant states that within said period he resided, and has ever since resided, in the city of Washington, and, during said period, in the immediate neighborhood of the claimant's residence ; that he has a perfect recollection of two horses kept in the stable attached and belonging to the premises of the claimant, one a bob-tailed black, and the other a sorrel, of fine figure and form, with white or flaxen mane; that these horses were attended to by an old black man in the employment of the claimant, then residing on the premises, the claimant himself being generally absent from home ; and that he, affiant, has good reason to believe and does believe that said horses were the claimant's property. The affidavits do not sustain this case. Neither the affidavit which speaks of two horses, nor the other which speaks of one, states how long within said period either horse was in the possession of the claimant's family. Besides, there is nothing to show that at any time within said period the claimant had any horse in actual service, as said act of 1816 expressly requires ; that is, as we understand the act, in the actual public service in which the claimant was engaged.

There is, therefore, no ground for this claim for forage, and the accounting officers were right in rejecting it.

The fourth charge in the petition is for a certain per diem allowance, *in addition* to the usual allowance for quarters and fuel.

The account presented by the claimant is as follows :

"The United States to James Kearney, Lieutenant Colonel Topographical Engineers. Dr.

"To per diem allowance in addition, to the usual allowance for quarters and fuel, allowed by the regulation of the Secretary, and sanctioned by the President of the United States, of the 16th July, 1836, whilst engaged upon an extended line of improvement, viz :

the Eastern Shore railroad, Md., from April 14, 1836, to March 28, 1837, inclusive, 349 days, at \$1 50 per day..... \$523 50

“To per diem allowance, in addition to the usual allowance for quarters and fuel allowed in pursuance of the above named regulation of July 16, 1836, while engaged upon an extended line of improvements in North and South Carolina, from March 29, 1837, to April 16, 1839, inclusive, 749 days, at \$1 50 per day 1,123 50

1,647 00

“JAMES KEARNEY.”

During the period embraced in the last two charges the claimant was a topographical engineer as aforesaid.

In regard to the first of those charges, that is, whilst the claimant was engaged upon an extended line of improvement—the Eastern Shore railroad, Md.—we have a letter from Lieutenant Colonel Abert, of the Topographical Bureau, to the claimant, dated April 9, 1836, before copied into this opinion. That letter assigns to the claimant the duty of superintending the survey of said Eastern Shore railroad route. And we have also the statement of Colonel Abert that the claimant was in the command of a party of engineers, and executed a survey of that route in 1836. That survey was made under a resolution of the Maryland legislature.

With respect to the other charge, viz: while the claimant was engaged upon an extended line of improvement in North and South Carolina, &c., we have an act of Congress of the 3d of March, 1837, appropriating \$10,000 for the survey of an inland route from the Chesapeake bay to Charleston, South Carolina, (5 Statutes at Large, 90,) and a letter from Lieutenant Colonel Abert, dated March 28, 1837, assigning that survey to the claimant. There is also a letter from Colonel Abert dated October 19, 1837, to the claimant, committing to him a certain part of the examination of the Southern coast; and a statement from the same officer that, in 1837, the claimant was in command of a party of engineers, and executed a survey near the coasts of North and South Carolina.

It appears, therefore, from the forgoing evidence, that the claimant as a topographical engineer, was engaged in said surveys as aforesaid, under the orders of Colonel Abert of the Topographical Bureau, during the times alleged in the petition.

The question, then, is, can the claimant, for such employment, demand over and above his regular pay and emoluments as a topographical engineer, the said per diem allowance?

There is no act of Congress referred to giving, in such cases, this additional pay. The claimant relies on the following grounds:

1. A rule alleged to have been adopted by President Jackson for surveys, namely, that where surveys by his predecessor had been commenced as national, they were to be completed.—1829

“Adopted.

J. K.”

2. The following arrangement of General Cass, Secretary of War viz: "I consider the suggestions of General Gratiot entitled to great weight. From the great number of public works to be constructed this year, and from the limited number of the experienced officers of the engineer corps capable of directing them, it has been found necessary to assign to some of them the superintendence of many of the works. Their expenses on account of quarters and fuel are thus much increased, and I think some allowance should be made to meet this additional burden, though not to the extent recommended by General Gratiot. It appears to me that an addition of one dollar and fifty cents to the present commutation for quarters and fuel is as much as ought to be allowed. Let this be the maximum, and to be granted to no officer not superintending more than two works. And when General Gratiot thinks right, he will recommend a graduation, so that those having the most works may receive the highest allowance. But this arrangement will be considered entirely provisional, and of no force whatever unless approved by the President. Should the President approve it, on his return, it will take effect from this date.

"L. C.

"JULY 16, 1836."

The above arrangement of the Secretary having been referred to the President, he made the following endorsement:

"Upon an account and proper vouchers for the extra expense incurred being made out, let them be allowed, agreeably to the within recommendation.
A. J."

To recover the per diem in question the claimant must show his case to be within the last above mentioned order of President Jackson, connected with General Cass's arrangement, to which the order refers. But that the claimant has not done.

First. The order applies only to an engineer when superintending more than two works at the same time; but the claimant did not superintend more than one work at the same time.

Secondly. The engineer could only claim upon presenting an account and proper vouchers for the extra expense incurred; but the claimant has produced no such account and vouchers.

Our opinion is, that there is no foundation for this per diem charge.

We now come to the last item claimed in the petition. The account is set out as follows:

"The United States to James Kearney, lieutenant colonel topographical engineers. Dr.

"To per diem allowance as a member of the Board of Internal Improvement, in pursuance of the order of the War Department of January 15, 1830, in reference to the Muscle shoals improvement, from the 30th of January, 1830, to the 28th day of March, 1831, being 423 days, at \$4 50 per day..... \$1,903 50

“To per diem allowance as a member of the same Board, in pursuance of the regulation of the Secretary of War of the 30th (10th) June, 1830, in relation to the surveys and reports on the Pennsylvania and Ohio improvements, and also in continuation of the Muscle shoals improvement, from the 29th day of March, 1831, to the 14th day of April, 1836, inclusive, being 1,843 days at \$4 50 per day..... 8,296 50

\$10,197 00

“From which is to be deducted the amount received for quarters, fuel, per diem, and transportation, to be ascertained at the Treasury Department within the periods specified.”

During the said period for which the claimant charges this \$4 50 a day as a member of the board of internal improvement, he was receiving as topographical engineer aforesaid the pay and emoluments of a major of cavalry. (2 Statutes at Large, 819, sec., 3 ; 3 Statutes at Large, 298, sec., 9.)

The following facts are connected with this claim :

On the 30th of April, 1824, an act of Congress was passed which authorized the President of the United States to cause the necessary surveys, plans, and estimates to be made of the routes of such roads and canals as he might deem of national importance, &c.; the surveys, plans, and estimates to be laid before Congress. And, to carry those objects into effect, the President was authorized to employ two or more skilful civil engineers, and such officers of the corps of engineers, or who might be detailed to do duty with that corps, as he might think proper ; and thirty thousand dollars were appropriated, &c. (4 Stat. at Large, 22.)

Soon after the passage of this act, viz : on the 31st of May, 1824, General Macomb, by direction of the Secretary of War, wrote to General Bernard, assistant engineer, Lieutenant Colonel Totten, of the corps of engineers, and Mr. Sullivan, civil engineer, informing them that the President had appointed them under said act as a board of internal improvement to superintend the execution of the provisions of the act ; that there would be attached to the board, for the present, Major Abert, of the topographical engineers, with five assistant lieutenants ; Captain McNeill, of the same corps, with an equal number, and Mr. Schriver, who was well acquainted with the localities of the country, and who was authorized to employ, under the directions of the board, five citizen surveyors, and that Captain Poussin, of the topographical engineers, Lieutenants Courtenay and Dutton of the corps of engineers would be immediately attached to the board in its operations. This letter further states that the officers detailed for service and the citizens employed would report to the board for orders ; that the rules and regulations established in the prosecution of the survey of the coast would apply to the disbursements of the appropriation and the compensation to be allowed the officers of the army who might be detailed for service under the act ; that the board would observe the same rules in reporting, from time to time, the progress

made in the execution of the duties assigned to them ; and that they would proceed to make an immediate reconnoissance of the country between the tide-waters of the river Potomac and the head of steam-boat navigation of the Ohio, &c.

On the 15th of January, 1830, General Gratiot wrote to the claimant, Lieutenant Colonel Kearney, as follows :

“SIR : I have to acknowledge the receipt of your letter of the 14th instant, accompanied by five books of field notes and eight maps of surveys, relating to the improvement of the navigation of the Tennessee river, at the Muscle and Colbert shoals.

“The maps and field notes have been sent to the board of internal improvement, by whom a project for the proposed work is to be made; and, in order that the board may avail itself of your personal knowledge in relation to the subject, the Secretary of War directs that you be associated as a member of the board in preparing their report. You will, therefore, see General Bernard, who has the necessary instructions in this matter, and make arrangements with him for the immediate commencement of the report, which it is desirable to have at an early date.”

“On the 10th of June, 1830, General Gatroit, by order of the Secretary of War, issued an order as follows :

“The board of engineers for internal improvement is hereby organized, to consist of the following officers, viz :

“General Bernard, assistant engineer.

“The topographical engineer in charge of the Topographical Bureau of the Engineer department.

“Such officers of the corps of engineers as may be, at any time, attached to the board by the chief engineer.

“The engineer or other officer, civil or military, who may have conducted the surveys relative to any project submitted to the board, will be considered a member of the board during the preparation of the report on such projected work, and for that purpose only.

“The board will, as heretofore, report to and receive their orders from the Engineer department.

“Major Poussin will continue to act as assistant to the board.

“In consequence of the additional duties hereby assigned to the officer in charge of the Topographical Bureau, that part of engineer order No. 3, dated the 20th of February, 1829, which requires him to perform the duties of assistant to the chief engineer, in certain cases, as rescinded.”

Colonel Kearney's claim to have been a member of said board of internal improvement originated with said letter of the 15th of January, 1830, and said order of the 10th of June, 1830. He would, according to that letter of the 15th of January, be a member of said board during the time he assisted the board in preparing their report in the case to which the letter refers. He would, likewise, under said order of the 10th June, be such member during the time he assisted the board in preparing other reports on projected works, the surveys of which he had been conducted by him, and also during the time he

should be in charge of the Topographical Bureau of the Engineer department.

The only evidence we have of Colonel Kearney's assistance in preparing any of said reports is his signature to the following reports as a member of said board, viz: Reports dated April 1, 1830, December 18, 1830, and March 25, 1831. (See 6 vol. Ex. Doc., 1st sess., 29th Cong., No. 167, pp. 2, 7, 16.)

As to the length of time he was engaged in assisting in the preparation of those reports we have no evidence.

The evidence of his having had charge of said bureau is a letter of Colonel Abert's of the 11th of June, 1851, in which the writer says that Kearney had charge of the Bureau of Topographical Engineers from the 6th of October until the 27th of December, 1832.

We are next to examine whether the military members of the board of internal improvements were entitled to said extra allowance of \$4 50 a day in lieu of quarters, &c.

The appropriation made by said act of 1824 was under the control of the President of the United States. Gen. Macomb's letter of the 31st of May, 1824, written by direction of the Secretary of War, is to be considered the act of the President. In that letter, before referred to, there is the following clause: "The rules and regulations established in the prosecution of the survey of the coast will apply in the disbursements of the appropriation and the compensation to be allowed the officers of the army who may be detailed for service under the act. The board will observe the same rules in reporting, from time to time, the progress made in the execution of the duties assigned them."

That clause relates not to the members of the board in particular, but generally to the officers of the army who should be detailed for service under the act.

The claimant contends that the rules and regulations referred to in said clause mean the following order:

"DEPARTMENT OF WAR, *May* 12, 1818.

"Until otherwise ordered the chief engineer, while resident in Washington, will be allowed at the rate of \$912 a year, in lieu of fuel and quarters. He will also receive double rations. The officers who compose the board of engineers will be allowed \$4 50 a day in lieu of fuel, quarters, transportation, and the per diem allowance for reconnoitering, while engaged in the duties assigned the board. The officer whom General Swift may detail to aid in performing the duties of the engineering department will be allowed \$1 50 a day in lieu of fuel and quarters.

"J. C. CALHOUN."

We cannot see how, merely from the face of the papers, the words in General Macomb's letter, viz: "The rules and regulations established in the prosecution of the survey of the coast," can be said to mean the above order of Mr. Calhoun. There is nothing in this order about the survey of the coast; and we must therefore say, in the absence of all evidence of explanation, that the order of 1818, relied on, does not show that the claimant, as a temporary member of the board

of internal improvement under the act of Congress of 1824, is entitled to the extra pay of \$4 50 a day in lieu of fuel, quarters, &c.

The claimant himself has furnished a written argument which concludes as follows:

“The only way in which I can account for the apparent silence of the record respecting payments to members of the board in this, viz: The only military members of the board of internal improvement, when first organized, were also members of the board of fortification, and for that reason entitled to the allowance in question, could not appear as recipients of the same from the appropriations under the act of 1824. But it is possible that the explanation may be concealed in some of the secret drawers of the accounting officers of the government. Certain it is that I have often heard a loose, though indefinite rumor of the members of the board being entitled to an allowance of some sort, say \$4 to \$4 50 per day.”

Our opinion is, that this last claim in the petition of \$4 50 a day from the 30th of January, 1830, to the 14th of April, 1836, being two thousand two hundred and sixty-six days, and amounting to \$10,197, subject to proper deductions for quarters, fuel, &c., is not sustained by the evidence.

We have now noticed all the claims set out in the petition, and our conclusion is, that the claimant has no cause of action.

ENGINEER DEPARTMENT,

Washington, March 22, 1825.

SIR: The enclosed instructions of the board of internal improvement relating to the service upon which you are to be employed during the ensuing season, have been examined by this department, and being approved are transmitted to you herewith to be carried into effect.

The new regulations about to be published require that copies of all instructions of the nature of those enclosed be prepared by the officer to whom they are addressed, and transmitted to this department; and your early compliance herewith in relation to those now sent is desired.

I have the honor to be, very respectfully, your obedient servant,

ALEXANDER MACOMB,

Major General Chief Engineer.

Major JAMES KEARNEY,

Topographical Engineers, Washington.

ENGINEER DEPARTMENT,

Washington, June 26, 1826.

SIR: Herewith is enclosed for your government, a letter addressed to you of this date from the board of internal improvements, containing instructions relative to the survey, &c., of a route for a canal from Conneaut lake, along the valleys of its outlet, to French creek, of

French creek and of Alleghany river to Pittsburg, which have been prepared by the direction of this department and approved of.

You will be expected to furnish a copy to the department as directed by the regulations.

I have the honor to be, very respectfully, your obedient servant,

J. L. SMITH,

Capt. Corps of Eng's, acting in the absence of Chief Eng'n.

Major JAMES KEARNEY,

Top. Engineers, Meadville, Pennsylvania.

ENGINEER DEPARTMENT,

Washington, July 10, 1826.

SIR: You will detail one of the officers of your party and furnish him with the requisite instructions for carrying into effect the objects of the following appropriations which were granted at the last session of Congress, viz: "Four hundred dollars for making a survey of Sandusky bay, to ascertain the expediency and expense of constructing piers, to improve the navigation thereof, and of placing buoys therein, and two hundred dollars for making a survey of La Plaisance bay to ascertain the expediency of improving the navigation thereof, and the expense of effecting the same.

Your instructions may be general, leaving the details to be determined by the judgment and discretion of the officer. It will not, then, be necessary for you to visit the ground, and consequently you will not be required to withdraw your personal attention from the more important concerns of the Ohio and Erie Canal surveys.

It is left with you to fix the time at which to make the detail within directed, except so far as that it is expected the detail will be made in time to admit of the completion of the surveys during the present season, and also the rendition to the Engineer department of the report and drawings relating thereto.

Should it not be completed before the 30th of September next, the progress which may have been made up to that time must be reported to the Engineer department, to admit of its being introduced in the annual report of the chief engineer. This remark applies also to the other operations in which you are engaged.

The amount appropriated for these two surveys will be disbursed by the officer you may detail to execute them. The expense of the survey in either case must not exceed the amount specifically appropriated.

I have, &c.

J. L. SMITH, *Cap't Corps Engineers,*
Acting in the absence of the Chief Engineer.

Major JAMES KEARNEY,

Topo. Engineers, Meadville, Pennsylvania.

ENGINEER DEPARTMENT,

Washington August 24, 1826.

SIR: Two communications from you, dated the 10th of this month, were received this day; one of them acknowledges the receipt of the

instructions of the department, dated the 10th ultimo, relating to the detailing of one of your assistants and furnishing him with instructions to make surveys of Sandusky and La Plaisance bays, and mentions also a letter of instructions received from General Bernard, and encloses a copy of the same. The other acknowledges the letter of the department of the 17th ultimo, and encloses vouchers Nos. 5 and 6 of your accounts for the 2d quarter of this year, and contains remarks on voucher No. 8 of the same quarter, which was sent with No. 5 for explanations.

If detaching an officer from your brigade to make the surveys of Sandusky and La Plaisance bays, in pursuance of the instructions of the 10th of July last, will embarrass or retard the progress of other operations confided to your direction, it is to be regretted, but it cannot be avoided, and, therefore, you will lose no time in despatching the officer with the needful instructions for executing those surveys. The sums appropriated for defraying the expenses of those surveys, viz., \$400 for Sandusky, and \$200 for La Plaisance bay, will be deposited to your credit in the Bank of Michigan, at Detroit, and you will transfer the same to the officer who may be selected to perform the duty. The letter of General Bernard to you, a copy of which you have enclosed to the department, as before stated, appears to be the same as that forwarded to you with the letter of the department of the 26th of June last. If you have not received that communication—and if you have it has not been acknowledged—it is fortunate, and although unusual and informal, it is not to be regretted that in this case General Bernard has sent directly to you a copy of his instructions, the original of which was sent through this department, as has been stated. It would be very satisfactory if the surveys relating to the route through the valley of the Shenango and Big Beaver, could be completed in time to admit of the commencement during the present season, of those embraced by the instructions of General Bernard, just mentioned, relating to a route through the valley of French creek and the Allegany. This desirable object, however, must be relinquished if an attempt to accomplish it would involve any risk of failure of the other route upon which you are now engaged.

It would appear by the tenor of the remarks you have made in relation to voucher No. 5, which was sent to you for “explanation and correction,” and in regard to which some items were specified as being not approved, that you supposed it to have been returned to you with the final rejection, not only of the items specified, but of the whole voucher, including other items to which no exception was made. If such was your supposition it was erroneous. The voucher was returned to afford you an opportunity of sustaining the items specified as not being approved. Had the declaration of non-approval been intended as final it would have been written, not in pencil, but in ink, and the voucher would not have been sent to you, but it would have been sent to the Auditor with a view to the items approved being credited and those not approved being disallowed. The objections to the items for Adams’s Essays and Green’s Astronomy are removed by the explanations contained in your remarks, but they remain unchanged in relation to the other items specified. But the explanation

must be stated on the voucher, or on a paper attached to it, before the objection to Adams's Essays and Green's Astronomy can be withdrawn; and the voucher, therefore, is again returned, that you may furnish the required explanation respecting those, or any other of the items specified.

The remarks you have made upon the objections of the department endorsed upon No. 8, will be taken into consideration when that voucher shall be in the possession of the department. You will therefore return it to the department without delay. If you wish to offer any explanation in relation to those objections, it must be attached to the voucher, since it cannot otherwise be taken into consideration; but whether you offer any explanations to the voucher or not, it is expected it will be sent to this department forthwith on the receipt hereof.

I have the honor to be, very respectfully, sir,

Your most obedient servant,

ALEX. MACOMB,

Major General, Chief Engineer.

Major J. KEARNEY,

Top. Eng. Bureau, Beaver County, Pennsylvania.

ENGINEER DEPARTMENT,
Washington, October 14, 1826.

SIR: The Secretary of War has directed that you will fulfil the intentions of the House of Representatives, as set forth in the report of the Committee of Roads and Canals, made in pursuance of a resolution of the House of Representatives of the 16th of January, 1826, by making a "survey and location of a road from the eastern termination of the Black Swamp road, in Ohio, to intersect the Cumberland road at or near Washington, in Pennsylvania; and a survey of a road from Pittsburg, in Pennsylvania, by the way of Beavertown, New Lisbon, Canton, and Wooster, to the eastern termination of the United States road from the rapids of the Miami of Lake Erie to the western boundary of the Connecticut Western Reserve, in the State of Ohio." You will therefore not come on to Washington city, as you have intimated to the department in your letter of the 1st instant, which has this day been received, but make your arrangements to make the surveys above indicated as early as possible, and not return till you have completed them. You can divide your brigade into two parties for the purpose, selecting the officer to command the party which you will detach who, in your opinion, will be best qualified to direct the operation. On Monday a more detailed order will be given you. You will make your requisitions forthwith for money to defray the expenses of these surveys.

I am, sir, with great respect, your obedient servant,

ALEX. MACOMB,

Inspector General.

To Major JAMES KEARNEY,

Topographical Engineer at Pittsburg, Pa.

ENGINEER DEPARTMENT,
Washington, October 18, 1826.

SIR: In conformity with the views of the Committee on Roads and Canals of the House of Representatives, as set forth in their report of the 15th of May, 1826, made in pursuance of a resolution of the House of the 16th of January last, to inquire into the expediency of authorizing the survey and location of a road from the eastern termination of the Black Swamp road, in Ohio, to intersect the Cumberland road at or near Washington, in Pennsylvania; and also, in pursuance of a resolution of the House of the 25th of April last, to inquire into the expediency of providing for the survey of a national road from Pittsburg, in Pennsylvania, by way of Beaver Town, New Lisbon, Canton, and Wooster, to the eastern termination of the United States road from the rapids of the Miami of Lake Erie to the western boundary of the Connecticut Western Reserve, in the State of Ohio, the Secretary of War has directed me to give you instructions to carry into effect the intentions of the committee.

The first route commencing at the termination of the Black Swamp road, the line will run through Wooster, New Philadelphia, Cadiz, and thence to Wheeling. The route from Cadiz, through Wellsburg, to Washington, in Pennsylvania, will also be examined, with a view of comparing it with the route to Wheeling. The route indicated by the resolution does not specify any other points than the eastern termination of the Black Swamp road and the intersection of the Cumberland road at or near Washington, in Pennsylvania; and I have indicated the probable direction that it would take by a direct line passing through the several towns specified above, which, by examining the map of Ohio, appear to be in the general direction. You will, however, examine all the different routes which present themselves to you, and which you may deem worthy of consideration. The second route, commencing at Pittsburg, through Beaver Town, New Lisbon, Canton, and Wooster, to the eastern termination of the Black Swamp road, is sufficiently marked out as to its general direction; it intersects and communicates with the first route at Wooster.

Having completed the examination of all the sections of route belonging to each contemplated general route, you will select those which, in your opinion, will better fulfil the object, and leaving out the others to be described separately, you will, in your report, draw up successively the description of each general route. To this effect is annexed to these instructions a model of an itinerary table, which will afford the facility of comprehending, within a small compass, all the main facts belonging to each route, and which, by exhibiting at a single view all the local circumstances, will assist you in the comparison of the respective qualifications of each route.

A written report and a topographical map will present the results obtained by your examination, and afford the facts and data upon which your recommending one of the routes examined will be predicated. Your map will be upon a scale of ten miles to an inch.

During your examination the measurements and levellings will be limited to those strictly indispensable to fulfil the object contem-

plated. The width of the streams at the places where they are to be crossed by bridges will be ascertained, as also the length of causeways across marshes and the flat bottoms of valleys. As to the length of the road, it may be computed from authentic records and from satisfactory information; however, measurements should be made when you are not satisfied with the result of your inquiries. With respect to levellings, they will be limited to those necessary to ascertain the graduation, and with a view to determine, for each section of the road, the number of miles at two degrees and under; at three degrees and above two; at four degrees and above three. You will consider the slope of four degrees as the greatest to be adopted.

You will make an approximate estimate of the expense of construction of each route upon the supposition that their pavement, upon the McAdam's plan, should be sixteen feet in width, nine inches in thickness, and that the bridges, culverts, &c., should be substantial.

Your report, itinerary tables, topographical map, and estimate, will be forwarded as soon as completed to the Engineer department. On this subject I must apprise you that it is expected by the Secretary of War that you will furnish, during the ensuing session of Congress, all the results of your examinations, and it is in this view that I have limited your operations to those which are deemed strictly necessary for the fulfilment of the object contemplated.

I have the honor to be, sir, very respectfully, your obedient servant,

ALEX. MACOMB,

Major General, Chief Engineer.

P. S. Enclosed herewith, for your information, is a letter from Mr. Marshal, dated the 29th of September, 1826, with a sketch of the route of the road.

OFFICE OF TOPOGRAPHICAL ENGINEERS,
Georgetown, September, 1827.

SIR: Enclosed herewith is a copy of an order from the Engineer department, dated December 9, 1826, which I transmit for your information and government.

You will please to report to me immediately the numbers of the rooms which you occupy in the office, and on the last day of each month the names and rank of the officers and other persons under your command, and the duty on which they may be engaged. I have likewise to call your attention to the paragraph of the above mentioned order which relates to requisitions for instruments and other articles necessary for carrying on your operations.

I have the honor to be, sir, your obedient servant,

JAMES KEARNEY,

Lieutenant Colonel and Topographical Engineer.

ENGINEER DEPARTMENT, *December 9, 1826.*

The topographical engineers and their assistants, and the civil engineers and their assistants, will rendezvous at the Bank of Columbia

to complete their memoirs, maps, and drawings, and other works connected with their duties when not employed in the field. The senior officer present will command the whole, and give the orders needful to the service.

Rooms will be assigned to the different brigades according to their wants under the direction of the senior officer, and when once assigned, they are not to be changed without his consent.

All requisitions for instruments and other articles necessary for the establishment and carrying on the operations directed, will be made by the several officers commanding brigades, and submitted to the senior officer, who will forward them to the Engineer department, with such recommendation or remarks as he may think proper.

Office hours are fixed from 9 a. m. to 3 p. m. ; and, when the service may require it, the evening will also be devoted to the performance of duty at the office.

Officers of the topographical service will not absent themselves from duty without the permission of the senior officer. Application for leave of absence for any period more than three days must be made to the chief engineer.

A monthly report of the names and rank of the officers and other persons employed will be made out by the senior officer. This report will state the brigade to which each is attached, and the duty on which they may be engaged. It will be forwarded on the beginning of each month to the chief engineer.

Two orderlies will be allowed, whose pay will correspond with that of the orderly attending on the board of engineers.

ALEX. MACOMB,
Major General Chief Engineer.

GEORGETOWN, D. C., *December 16, 1826.*

The following is the arrangement of the rooms under the order of the Engineer department, dated the 9th instant. Each officer commanding a brigade will govern himself accordingly :

Lieutenant Colonel Abert and brigade, No. 1, and the large banking room.

Major Kearney and brigade, Nos. 2 and 3.

Major Long and brigade, No. 11.

Captain McNeill and brigade, Nos. 5 and 7.

Doctor Howard and brigade, No. 10 and closet No. 9.

Very respectfully, sir, your obedient servant,

J. J. ABERT,
Top. Eng. and Lieut. Colonel Commanding.

Major KEARNEY.

ENGINEER DEPARTMENT,

Washington, May 24, 1827.

SIR: The department acknowledges the receipt of your letter of the 22d instant, asking its attention to the subject presented for considera-

tion in your communication of the 25th of March last, in which was enclosed the letter of instructions to you (dated on the 16th of March last) from the board of internal improvement.

In relation to those subjects I have to inform you that the instructions of the board of internal improvements are approved, and that it is the wish and intention of the department that those instructions be all carried into effect during the current season, and that the several examinations and surveys therein stated be executed in the order in which they are indicated in those instructions, should there be found no material ground of objection to such a course; but should there be any weighty objection to the execution of those objects in the order stated, you will exercise your own discretion and judgment in reference to the matter. The department desires that you lose no time in putting these contemplated objects in a train of accomplishment.

With respect to the duties heretofore assigned to you, the reports in regard to which are not yet completed, you will take such measures, not inconsistent with the due execution of the instructions of the board of internal improvement hereinbefore alluded to, as your knowledge of their relative importance may suggest.

I return those instructions herewith, and request you to furnish the department with a copy of them, according to regulations.

In addition to the officers now attached to your brigade, Lieutenant G. W. Whistler, of the artillery, has been ordered to report himself to you at Washington by the 1st of July next; and the department has this day requested the Secretary of War to cause Lieutenants J. R. Irwin and J. W. F. Carris, of the artillery, to be ordered to report to you for topographical duty at Pittsburg. Lieutenant Whistler will receive and execute such office duties at headquarters, and other topographical duties there or elsewhere, as you may assign to him.

I am, very respectfully, your obedient servant,

ALEX. MACOMB,
Major General Chief Eng.

Lieut. Col. JAMES KEARNEY,
Topographical Engineer, Washington City.

ENGINEER DEPARTMENT,
Washington, June 4th, 1828.

SIR: I am directed by the Secretary of War to inform you that during the present season your attention is to be directed to the following surveys and examinations in the States of Pennsylvania and Ohio, viz:

1. The completion of the survey of a canal route from the head of the Big Beaver creek, by the valley of the Mahoning river to the Akron summit of the Ohio canal; which survey was commenced by you and your assistants last year.

2. The survey of the Alleghany river, from Pittsburg to the mouth of French creek, with a view to effecting a slack-water navigation of that river.

3. The examination of a route for a road from Uniontown, Pa., via Pittsburg and Beaver, to Cleaveland in Ohio. Of a part of this route it is understood that a minute survey has been made, and it is therefore supposed that the examination will not occupy much time. A copy of a report made to the House of Representatives by their Committee on Roads and Canals, on the subject of the road just mentioned, is herewith enclosed, as also copies of two letters from Messrs. Jas. Geddes and N. S. Roberts, in relation to the improvement of the Alleghany river. The instructions which you have previously received from the Board of Engineers, and your experience on these subjects in general, and particularly in this part of the country, render unnecessary more minute instructions at present. A suitable number of assistants, for the purposes above mentioned, will be assigned to you, and it is expected that you will proceed without delay to commence operations, as the season is already considerably advanced.

By consulting the Hon. Robert Orr, jr., you may be able to obtain some useful information on the subject of the Alleghany river, in the improvement of which he feels interested; and the Hon. A. Stewart will assist you in obtaining the reports of surveys which have been made of the road from Uniontown to Pittsburg.

You will furnish quarterly estimates of the probable amount of funds required to prosecute these surveys, and you will keep the accounts of expenditures in such a manner as to exhibit distinctly the cost of each, having a view, in your disbursements, to the strictest economy.

Respectfully, sir, your obedient servant,

A. MORDECAI,

Lieut. Engineers, Asst. to Chief Engineer.

Lieut. Col. J. KEARNEY,

Topographical Engineer, Washington

BEDFORD, PA., July 2, 1828.

SIR: Having been informed that it was contemplated by your department to connect the national road with the Pennsylvania turnpike from Harrisburg to Pittsburg, by a permanent artificial road, a public meeting of the citizens of our county, interested in the proposed measure, was called, and took place on the 10th day of June last.

At that meeting the subscribers were "appointed a committee to draft and sign a petition to the Secretary of War, setting forth the practicability, utility, and importance of the measure contemplated." And at the same time a committee of six respectable citizens of our county was appointed to examine the ground best adapted for the contemplated road; to measure the distance and make report to us. Their report we have this morning received, accompanied by a draft, hereto annexed, of the courses and distances, made by an experienced surveyor, in whose integrity and accuracy we have full confidence.

That the road here proposed could be made at a less expense than upon any other contemplated route, we believe will not be denied—the materials being more convenient and the distance considerably

shorter, and that it would be of greater public utility will not as we conceive, be questioned by any impartial mind. The whole distance from Washington to Pittsburg would probably be from fifteen to twenty miles shorter than by Uniontown—a fact of great importance to the government, as well as to individuals. Travellers would have a choice of good roads from Hancock westward, and all the intermediate towns and counties between that place and Pittsburg would be very greatly accommodated. The same advantages would result to the travelling eastward, and a portion of the produce of this section of country might be directed to a market south of Baltimore, to the advantage of all parties.

From the official list of post offices and post roads it will be seen that	
the distance from Washington city to Hancock is.....	93 miles
Contemplated road per draft.....	22
Thence to Bedford	16
To Pittsburg.....	96
	— 227
From Washington city to Uniontown is.....	197
Supposed distance to Pittsburg.....	46
	— 243
	—
Difference	16

And the connecting road on our proposed route would be but of half the extent of that by Union.

The subscribers, therefore, in obedience to the instructions of their constituents, very respectfully request that an examination and survey of this route be directed by your department to be made by the engineers of the government, previous to a final decision of the question. And they beg leave to state to the honorable the Secretary of War, that they feel a greater confidence in the success of this application, from the consideration that the great national road (of which the location in this direction would have been more beneficial to the department) was constructed altogether by the public, whilst our turnpike owes its existence in a great measure to the enterprise and liberality of public spirited individuals.

We are, honorable sir, with great respect, your obedient servants,

J. M. RUSSELL.

TIMOTHY HIGSON.

GEORGE BURD.

CHAS. McLAUGHLIN.

GEO. W. BARTON.

W. WATSON.

Hon. P. B. PORTER,

Secretary of War of the United States.

[For draft of route see original.]

ENGINEER DEPARTMENT,
Washington, July 29, 1828.

SIR: I transmit to you herewith a copy of a communication from a committee of the citizens of Bedford county, Pennsylvania, to the Secretary of War, requesting a survey may be made of a certain route for a road to connect the Cumberland road with the Pennsylvania turnpike, from Harrisburg to Pittsburg. The committee have been informed that, from the number of surveys with a view to internal improvement now under operation, and the limited means at the disposal of the department for such purposes, it will not be possible to direct the survey alluded to, to be made at this time; but that you would be instructed to make the survey asked for, should there remain sufficient time this season, after having completed the surveys already assigned to you; you will, therefore, should circumstances admit of it, after the close of your present engagements, proceed to make the survey designated in the enclosed memorial.

I have the honor to be, respectfully, your obedient servant,
By order of the chief engineer.

A. MORDECAI,
Lieutenant Engineers, Assistant Chief Engineer.
Lieutenant Colonel J. KEARNEY,
Topographical Engineers, Pittsburg, Pa.

HOUSE OF REPRESENTATIVES,
January 29, 1829.

Resolved, That the Secretary of War be directed to lay before this House the report of the engineers of a survey for a harbor at the mouth of the Elk creek, on Lake Erie, in the State of Pennsylvania.

Attest:

M. ST. CLAIR CLARKE, *Clerk.*

ENGINEER DEPARTMENT.

Received 30th July, 1829.

HOUSE OF REPRESENTATIVES,
January 20, 1829.

Resolved, That the Secretary of War be directed to report to this House, a copy of the survey and estimate made for a canal by the corps of engineers of the United States, from Portage summit to intersect the line surveyed by Colonel Kearney.

Attest:

M. ST. CLAIR CLARKE.
Clerk House of Representatives.

ENGINEER DEPARTMENT, February 3, 1830.

Referred to Lieutenant Colonel Kearney.

C. GRATIOT,
Corps of Engineers.

ENGINEER DEPARTMENT,
Washington, January 31, 1829.

[Engineer Order, No. 2.]

Lieutenant Colonel J. J. Abert, topographical engineer, will repair as early as practicable to this city, in order to take charge of the Topographical Bureau of the Engineer department, for which station he is hereby detailed.

The reports and returns required by paragraph 915 of the army regulations will be addressed accordingly.

C. GRATIOT,
Corps of Engineers.

ENGINEER DEPARTMENT,
Washington, February 20, 1829.

[Engineer Order, No. 3.]

In addition to the duties assigned by the general army regulations to the topographical engineer in charge of the Topographical bureau of this department, he will perform the duties of assistant to the chief engineer, in relation to such reconnoissances and surveys, both for military and civil purposes, as may be entrusted to topographical engineers, assistant topographical engineers, or civil engineers, under the direction of this department. He will therefore prepare and issue, with the sanction of the chief engineer, the instructions and orders necessary for that branch of the service, and in the absence of the chief engineer he will consult with the Secretary of War, upon extraordinary business presented to him, and be governed by his decision.

Correspondence relating to topographical service will be addressed, as heretofore, to the chief engineer.

C. GRATIOT,
Chief Engineer.

ENGINEER DEPARTMENT, TOPOGRAPHICAL BUREAU,
March 11, 1829.

SIR: I am directed by Colonel Gratiot, chief engineer, to require you to report, with as little delay as possible, what surveys remain to be completed or reported upon by you, and the state of forwardness of each.

Very respectfully, sir, your obedient servant,

J. J. ABERT,
Lieutenant Colonel of Topographical Engineers.

Lieutenant Colonel J. KEARNEY, *Washington.*

ENGINEER DEPARTMENT,
Washington, April 7th, 1829.

SIR: The President of the United States has directed that the necessary surveys for the location of a canal round the Muscle shoals of

the Tennessee river, and for the improvement of the navigation of the same river at Colbert's shoals, be made with the least practicable delay, and this service is entrusted to you. Lieutenant Turnbull, with one assistant, and Messrs. Swift & Gerion, assistant civil engineers, will report to you for this duty, and you will take it, with the necessary number of the officers of your present party, by which means it is hoped you will be able to execute these surveys with great despatch.

You will receive the requisite instructions from the board of internal improvement, and will proceed without delay to the scene of operations, on the completion of which you will return with your party (excepting Lieutenant Turnbull and his assistant, who will remain in Kentucky) to this place, to prepare the maps which are to be laid before the board of internal improvements. The necessary funds will be advanced on your estimates.

Respectfully, your obedient servant,

C. GRATIOT,

Brevet Brigadier General and Chief Engineer.

Lieut. Col. J. KEARNEY,

Topographical Engineer, Washington, D. C.

WASHINGTON CITY, April 11, 1829.

SIR: Agreeably to direction of the Engineer department, I send to you the present instructions relative to the location of works destined to improve the navigation of the Tennessee at the Muscle shoals and Colbert's shoals.

You will find herewith annexed a printed report and five sheets of drawing: they relate to an examination made by the board of internal improvement of the navigation of the Tennessee from Brown's ferry to Waterloo. I refer you to these documents for the information derived from preliminary surveys and examination. It is the desire of the Engineer department that you would be pleased to return these documents to the department, after having taken copies of such as might be useful to you; it is also requested that you would transmit a copy of the present instructions to the Engineer department.

In the report above mentioned, the board, with a view to overcome the obstructions at the Muscle shoals, has recommended a canal, either following the northern bank of the Tennessee, from Brown's ferry to Florence, or running through the plains of Courtland, leaving the Tennessee in the vicinity of Brown's ferry, and terminating at or near the mouth of Spring creek, below the town of Tuscumbia. Each of these routes will have to be located on the ground; and the surveys, levellings, &c., will have to be performed in such a way as to exhibit and afford all the facts and data upon which are to rest the planning, delineation, and estimate of the work and of its several details.

Canal from Brown's ferry to Florence.

From Brown's ferry to Florence the distance, in following the channel of the river, is about thirty-seven miles, out of which thirty-one

do not afford, at low water, a depth of more than eighteen inches ; on the six remaining miles, a depth of at least three feet is found. The distance between these same places, measured along the northern shore, has been computed to be $37\frac{6}{8}$ miles. On this distance the margin of the river presents intervening bluffs, forming together a length of $21\frac{1}{8}$ miles, and flat bottoms subject to be overflowed, and averaging together $35\frac{5}{8}$ miles. It must be remarked that, from Shoal creek to Sweet-water creek, distance six miles, the bank has not been considered as steep enough to be classed among the bluffs ; however, its slope precludes from admitting it altogether on the division of flat bottom.

The whole fall from Brown's ferry to Florence has been found by Lieutenant Jefferson Vail to be $263\frac{805}{1000}$ feet. The severe illness of this officer, and of his assistant, Mr. James Swift, has prevented connecting with the bed of the river the general line of levels run from Brown's ferry to Florence. Therefore, the first and indispensable operation to be performed will be to run a line of levels along the margin of the river, with a view to ascertain how the fall is distributed from Brown's ferry to Florence, as also to determine the lines of lowest and highest water in the river. These several results will be of main importance to fix on the number, elevation, and length of the levels forming the line of canal ; they will direct in the location of the aqueducts, locks, and embankments required, as also in the selection of the most convenient means of supplying the canal with water.

The *first section* of canal will run from the vicinity of Brown's ferry to Elk river : the distance will be from nine to eleven miles. Here two routes are to be investigated, compared, and located : one through the sluice channel, the other through the flat bottom. In locating either of them it will be necessary to procure all the local facts and surveys which will assist in determining whether this section must terminate into the Tennessee or into Elk river ; and, in either alternative, aid to plan the works to accomplish the object. Should the canal terminate into the Tennessee, two regulating locks will become necessary ; should it cross Elk river, either an aqueduct, or a dam erected below the crossing-place, will have to be resorted to ; and in the latter case, two regulating locks would be required.

Whether the route will follow the sluice channel or the flat bottom, embankments will become necessary to preserve the canal from being overflowed. But, in locating the work through the flat, the highest ground is to be selected in order to lessen, as much as practicable, the elevation of the embankments ; and even, should not the distance be too much increased by it, the canal might be located along the foot of the hills bordering on the flat bottom.

This section is to be supplied with water by the Tennessee ; therefore, a dam is to be erected at a convenient place below Brown's ferry. The upper end of Coxe's island seems to be favorable to facilitate the construction and insure the stability of the work. This dam is to be raised sufficiently to procure a depth of six feet in the canal at a low stage in the river. The commencement of the canal will be located between the dam and Brown's ferry, at a point convenient to erect a

regulating lock, and where the river will afford at least five feet at its lowest stage.

The *second section* of canal will turn round the bluff rising below the mouth of Elk river and terminate at Blue-water creek, on the whole distance of about ten miles, and the work will follow either the flat or the foot of the hills bordering on the flat-bottom; in either case conciliating shortness of distance with the least elevation of embankments.

At the bluff at the mouth of Elk river, as also at Dutch-landing bluff, it will become necessary to determine which means will prove the cheapest and most convenient either to cut the canal through the slope, or to support the work by walls, or to combine together these two means. Cross-sections of the bluffs are to be taken, the river at their foot must be sounded; and the nature of the bottom is to be ascertained, in order to be provided with all the data upon which the plan and estimate of those portions are to be predicated.

In locating this second section, the same investigations, determination of facts, and surveys, which have been recommended respecting the crossing of the bed of the Elk, are equally to be attended to in relation to Burney's creek, Second creek and Blue-water creek. Besides, these streams must be considered under the point of view of being, if necessary, used to supply the canal; and should, for such purposes, their aid be required, it will be indispensable to perform the surveys destined to the location of the several works which would accomplish the object.

This section of canal will be supplied by the Tennessee, if the Elk be crossed on an aqueduct, and by Elk river, if the passage of this stream be effected by means of a dam backing the river.

The *third section* will run from Blue-water creek to Shoal creek. On this distance, of about nine miles, there are but two bluffs, viz: Doublehead's and Taylor's, which make but partially close to the edge of the river. What has been recommended in relation to the two bluffs, on the preceding section, is equally applicable to Doublehead's and Taylor's bluffs.

The route will be located either on the highest ground of the flat or along the foot of the hills bordering on the flat bottom, which is interrupted but at the bluffs just mentioned. It is useless to state that the location must conciliate distance, economy, and security against the freshets.

It is anticipated that Four-mile creek and Six-mile creek may be crossed by aqueducts; but Shoal creek, as to its crossing and its fitness to be used to supply the canal, will require the same operations as those recommended for the tributaries crossed by the preceding sections of canal.

Whatever may be the mode adopted to cross Blue-water creek, it is much desirable that this section should receive from this stream a supply of water; therefore the works to effect this object are to be located, and all the facts connected with their estimate are to be ascertained.

The *fourth section* will follow along the slope of the hills which stretch parallel to the river from Blue-water creek to Sweet-water

creek. At many places, these hills approach very near to the water's edge, at others their foot affords room along the margin of the margin; at some the slope is gradual, at others precipitous. Therefore, this section will require an attentive examination and minute surveys. The canal, on this distance, will prove a series of portions running partially through sloping ground and of others altogether supported by walls and embankments. The cross-sections must be much multiplied all along the line; for without them it would not be practicable to make a plan and an estimate which would conciliate the fitness of the work with solidity and economy. Where walls are to be erected, the depth of the river and the nature of the bottom are to be carefully ascertained. Respecting the termination of this fourth and last section, it must take place at or near the mouth of the Sweet-water creek, at a point in the Tennessee where, at the lowest stage, five feet of water can be carried through down to Florence; a regulating lock is to be located at the point of termination.

This section, about seven miles long, has to rely for supply, either on the third section, fed by Blue-water creek, or on Shoal creek. It is disirable that the latter of these streams should be made available to compensate for the waste of water, which will be great on this part of the canal. Therefore, the works destined to fulfil this object, are to be located, and the facts in relation to them minutely ascertained.

A basin at each end of the canal will be indispensable. It is desirable that each basin, instead of being located into the river, should make part of the canal, connected with it, and guarded against the freshets. Owing to the great importance of the trade of Elk river, it is also desirable that a basin should be provided for, near the place where the canal will cross that river.

Canal from Brown's ferry to Spring creek.

The country south of the Muscle shoals, and comprehended between Malett's creek to the east, Spring creek to the west, and a range of hills to the south, is generally even, and appears to fall gradually from the bank of the river towards the south; it is to say in a contrary direction to the course of the tributary streams. It is, therefore, anticipated that a line of greatest depression might exist through this plain; which line has to be traced on the ground, and determined by surveying and levelling operations; it will be the route of the canal now under consideration.

Again, the fall from low-water mark at Brown's ferry, to low-water mark at Florence, has been found, as stated before, $163\frac{805}{1000}$ feet, thus the fall from the mouth of Malett's creek to that of Spring creek must be nearly the same, and perhaps the country in this direction will have a similar fall.

With a view to locate a canal on such a ground, it will be necessary to raise, by means of a dam, the Tennessee, below Brown's ferry, to an elevation which would permit to commence the canal at Malett's creek, and through its ravine to enter the plain and follow the line of greatest depression just now mentioned. The dam might be located at the upper end of Coxe's island, and its elevation determined on the relative

level of the plain, and the requisite of a depth of six feet in the canal. A lock is to be annexed to it to afford a communication between Elk river and the commencement of the canal; as also to keep open, at common stage of water, the navigation of the river.

It is desirable that the Tennessee should be examined from Brown's ferry to Flint creek, in order to ascertain whether on this portion of the river a location, better and more convenient than the preceding one, might be found respecting the dam, and the commencement of the canal. The latter would then enter the plain through one of the ravines or beds of creeks offered on this distance. Perhaps a dam across Flint creek might dispense with a dam across the Tennessee, and prove less expensive; in such a case the canal would have to be supplied altogether by Flint creek, but the canal would be much increased by such an arrangement. Another disposition might be to admit but a feeder from Flint creek to Malett's creek; the canal would then commence at Mallet's creek, where locks would effectuate the communication with the Tennessee. These two arrangements would dispense with a dam across the Tennessee, and are both to be closely investigated and compared to that which would necessitate the erection of a dam in the Tennessee. Surveys, levellings, and location have to be made in relation to the arrangement which will deserve a decided preference, and the facts and reasons on which will rest this preference will be minutely recorded.

On the supposition of the canal commencing at Malett's creek, the whole line will have, more likely, to be chiefly supplied of water by the Tennessee; for Big Nance's creek and Town creek, crossed by the work, do not yield much water in summer season, and besides, have their beds much depressed below the general surface of the ground. However, it is desirable that investigations and surveys should be made in order to secure the resources which might be drawn from these streams.

The canal, after having crossed these two creeks on aqueducts conveniently located, will follow the best and lowest ground to terminate into Spring creek, at a point whence five feet of water can be carried down to Tennessee river at its lowest stage.

At each end of the canal, a basin, making part of the work, is to be provided, and regulating locks are to be erected at the commencement and termination of the canal. Respecting the intervening locks on the line of the canal, the survey of the line of greatest depression will assist in fixing their location with a view to avoid extra embankments or extra cuttings.

Cross sections of the ground must be multiplied all along the line, and more especially where embankments are to be raised, and deep cuttings effected. The same is to be carefully attended to on the route from Brown's ferry to Florence. On both routes the nature of the ground is to be ascertained, and this, as far as practicable, to the depth of the bottom of the canal. The levels of low and high water in the streams crossed by the canal, are to be recorded and marked on the profiles; and this, more especially, on the Tennessee, from Brown's ferry to Florence. In running between these two points, the line of levels on the margin of the river, it is most desirable to have stations

at the head and foot of each fall, to enable to point out the degree of practicability of improving the navigation by means of dams and locks. The width and depth of the river, the nature of the bottom and banks where such work might be erected, are to be carefully recorded in the field-books.

In fine, the surveys, drafts, and field-books must present all the facts and local circumstances upon which the plan and the estimate of the two routes of canal just pointed out are to be framed and predicated. In relation to the elements upon which the prices are to rest, it will be indispensable to procure the best information respecting the price of labor, that of materials of every kind, and respecting also the places where these materials are to be obtained.

Shoals from Florence to Waterloo.

The printed reports and drafts Nos. 3 and 5, herewith annexed, show, that from Florence to Waterloo the river affords, in a distance of together twenty-four miles, at least five feet depth at low stage of water; but at several places, forming together a length of about four and a half miles, the channel of the Tennessee becomes obstructed by shoals, upon which the depth varies from fifteen to thirty inches.

These places are, Little Buck shoals, Colbert shoals, Yellow Spring shoals, Rocky Bar, and Bee-Tree shoals.

Each of them is to be minutely surveyed and sounded. The nature of the bottom is to be carefully ascertained, and on a length extending from deep water above to deep water below. Both shores, on each side of these obstructions, must be included in the survey, with a view to determine whether the obstacle shall be avoided by means of a lateral canal, or removed by deepening on a certain width the channel. It is desirable to know what is the depth of water over the obstruction at low, common, and high stage of the stream.

I will close up the present instructions, by begging of you to collect, on the spot, the best information respecting the kind and dimensions of boats which would better suit the trade which will have to be accommodated by the contemplated canal. For the present, we may assume for the dimensions of the locks sixteen feet breadth, and one hundred and sixteen feet length, measured between the hollow quoins, and for those of the canal a width of fifty-two feet at the water line, and a depth of six feet water.

I have the honor to be, sir, very respectfully, your ob't servt.

BERNARD,

Brig. Gen. Member of the Board of Internal Improvements.

Lieut. Col. JAMES KEARNEY,

Topographical Engineers, Washington city.

TOPOGRAPHICAL BUREAU, *July 10, 1829.*

SIR: I am directed by the Acting Secretary of War to require your immediate and undivided attention, to the report, estimate, and draw-

ings in relation to the survey of the Muscle shoals, and that you will endeavor to have the same completed by the first of November next.

I remain sir, very respectfully, your obedient servant,

JOHN J. ABERT,

Lieut. Col. Topographical Engineers.

Lieut. Col. JAMES KEARNEY,

Washington.

JANUARY 22, 1829.

DEAR SIR: General Gratiot in conversation said that it was not from any want of confidence in your ability that the order of the 10th was changed, as you will observe, but that General Bernard had been on that ground in the first instance; had made some examinations there; had probably prepared a plan, and in this stage of the business, it would be indelicate in him to take the work of the plan and estimates out of his hands.

Yours truly,

J. J. A.

Colonel KEARNEY.

TOPOGRAPHICAL BUREAU, *July 22, 1829.*

SIR: You will consider yourself as relieved from the necessity of making out the estimates stated in my letter of the 10th instant, and will confine your attention to the report and drawings.

By order of the chief engineer.

J. J. ABERT,

Lieut. Col. Topographical Engineers.

Lieut. Col. KEARNEY,

Topographical Engineer, Washington.

HOUSE OF REPRESENTATIVES,

January 20, 1830.

Resolved, That the Secretary of War be requested to communicate to this House the report of the engineer employed to make a reconnaissance of the mail and military road from Uniontown, Pennsylvania, by way of Pittsburg, to Lake Erie.

Attest:

M. ST. CLAIR CLARKE,

Clerk House of Representatives U. S.

ENGINEER DEPARTMENT,

February 3 1830.

Referred to Lieutenant Colonel Kearney.

C. GRATIOT, *Brigadier General.*

HOUSE OF REPRESENTATIVES, *January 20, 1830.*

Resolved, That the Secretary of War be directed, as soon as practicable, to return to this House a copy of the survey made of the harbor at the mouth of Elk creek, on the south shore of Lake Erie.

Attest:

M. ST. CLAIR CLARKE,
Clerk House of Representatives.

ENGINEER DEPARTMENT, *February 3, 1830.*

Referred to Lieutenant Colonel Kearney.

C. GRATIOT, *Brigadier General.*

HOUSE OF REPRESENTATIVES, *January 26, 1830.*

Resolved. That the Secretary of War be directed to return to this House, as soon as practicable, copies of the different surveys made by Colonel Kearney, from the Ohio river, in a direction to Lake Erie, with a view to the improvement of navigation in that direction, and the extension of the Chesapeake and Ohio canal.

Attest:

M. ST. CLAIR CLARKE,
Clerk House of Representatives, U. S.

ENGINEER DEPARTMENT, *February 3, 1830.*

Referred to Colonel Kearney.

C. GRATIOT, *Brig. General.*

ENGINEER DEPARTMENT,
Washington, December 17, 1830.

[Engineer Orders, No. 4]

By authority from the Secretary of War, a furlough for six months, to commence on the 1st of January, 1831, is hereby granted to General S. Bernard, assistant engineer.

C. GRATIOT, *Chief Engineer.*

ENGINEER DEPARTMENT,
Washington, April 27, 1831.

SIR: You will continue the preparation of the maps and memoirs relative to the surveys which have been made under your direction, for internal improvements in Pennsylvania and Ohio, reporting to this department the completion of each work as it may be effected.

For this purpose the services of your present assistants, Lieutenants Ramsay and Berrien, will be still available.

Respectfully, your obedient servant,

C. GRATIOT, *Brig. General.*

Lieutenant Colonel KEARNEY,

Topographical Engineer, Washington, D. C.

CIRCULAR.

TOPOGRAPHICAL BUREAU, *June 28, 1831.*

SIR: You will report to this Bureau, as soon as practicable, the duties upon which you are at present engaged; the probable time it will take you to complete them, and the names and rank of your assistants.

All your communications in relation to your public duties will be addressed to Lieutenant Colonel John J. Abert, Topographical Bureau, Washington, and put under an envelope directed to the Secretary of War, with an endorsement of "Topographical Bureau" on the outside of the envelope.

By order of the Secretary of War.

JOHN J. ABERT,
Lieutenant Colonel T. E.

Lieut. Col. JAMES KEARNEY,

Topographical Engineer, Washington, D. C.

[Order, No. 26.]

ADJUTANT GENERAL'S OFFICE,
Washington, June 22, 1831.

The following regulation has been received from the War Department, which is published for the government of all concerned:

WAR DEPARTMENT, *June 21, 1831.*

1. The Topographical Bureau will hereafter constitute a distinct Bureau of the War Department, and the officer in charge thereof will communicate directly with the Secretary of War, from whom he will receive all his orders, and to whom he will make all his reports.

2. All reports, returns, and communications from officers of the topographical engineers or others on topographical duty, will hereafter be made to the officer in charge of the Topographical Bureau, through whom, in addition to his previous duties, all orders to officers of the topographical engineers, or others on topographical duty, will henceforth pass.

3. The officer in charge of the Topographical Bureau, will comply with any application from the chief of the corps of engineers, for

any original document in said Bureau, or for copies of the same, and for surveys for purposes of fortifications.

P. G. RANDOLPH,
Acting Secretary of War.

By order of Major General Macomb.

R. JONES, *Adjutant General.*

TOPOGRAPHICAL BUREAU, *November 9, 1831.*

SIR: I beg leave to call your attention to the enclosed copies of resolutions of Congress, in relation to certain surveys made by you.

Very respectfully, sir, your obedient servant

JOHN J. ABERT,
Lieutenant Colonel T. E.

Lieut. Col. J. H. KEARNEY,
U. S. T. E., Washington, D. C.

[Engineer Orders, No. 2.]

ENGINEER DEPARTMENT,
Washington, November 11, 1831.

Colonel James Gadsden, having reported for duty as assistant engineer, he is hereby constituted a member of the board of engineers for fortifications, and of the board of engineers for internal improvements. He is to be respected and obeyed accordingly.

By order of the Secretary of War.

C. GRATIOT,
Bvt. Brig. General, Chief Engineer.

22d CONGRESS—2d SESSION—CONGRESS OF THE UNITED STATES.

IN THE HOUSE OF REPRESENTATIVES *December 13, 1832.*

On motion of Mr. Washington,

Resolved, That the committee for the District of Columbia, be instructed to inquire into the expediency of providing for the removal of the obstructions to the navigation of the river Potomac, between Georgetown and Alexandria.

Attest:

M. ST CLAIR CLARKE, *Clerk.*

Resolutions appointing a committee to inquire into the practicability and expediency of improving the Washington channel of the Potomac river.

Resolved by the Board of Aldermen and Board of Common Council of the city of Washington, That a joint committee, consisting of one member from each board, to be chosen by ballot, be appointed, whose

duty it shall be to inquire into and report upon the practicability and expediency of improving the navigation of the Potomac river, by removing an obstruction to the course of the channel, at and near square south of square number twelve, or by other means.

Resolved, That the said committee, in conjunction with the mayor, be authorized, in the name of the corporation, to request of the proper authorities that a United States engineer may be appointed to aid in the aforesaid inquiry and examination.

ALEXANDER McINTIRE,
President of the Board of Common Council.

PETER FORCE,
President of the Board of Aldermen.

Approved: November 10, 1832.

JOHN P. VAN NESS, *Mayor.*

TOPOGRAPHICAL BUREAU, *March 23, 1832.*

SIR: I have to call your attention to several resolutions of the House of Representatives, copies of which were duly transmitted to you, calling for the reports of surveys made under your direction. Three of these resolutions bear date the 20th of January, 1830, and one, the 26th of January, 1830. And one of these resolutions, of the 20th of January, has been lately renewed on the 6th of January, 1832.

As there is much anxiety to possess the information for which these resolutions call, you will please to report to this office, as soon as practicable, the causes which have delayed your reports, and the time when they may probably be expected.

Very respectfully, sir, your obedient servant,

JOHN J. ABERT.

Lieut. Col. Topographical Engineers.

Lieut. Col. JAMES KEARNEY, *U. S. T. E.*

TOPOGRAPHICAL BUREAU, *October 4, 1832.*

SIR: Public duty requiring me to be absent for several weeks, I am directed by the acting Secretary of War, to say to you that you will, during that period, take charge of this Bureau.

Respectfully, sir, your obedient servant,

J. J. ABERT,

Lieutenant Colonel T. E.

Lieut. Col. JAMES KEARNEY,
U. S. T. E., Washington.

TOPOGRAPHICAL BUREAU, *April 15, 1834.*

DEAR SIR: A resolution of the House of Representatives of the 10th instant, calling for "a copy of a report and survey made by Colonel

Kearney, United States engineer, of a harbor at the mouth of Elk creek, on Lake Erie," has been referred to this Bureau.

Upon an examination of the files of the Bureau, no such report appears to have been received, and Colonel Abert has directed me to ask you whether such survey has been made. My impression is, that a survey of Elk creek was made with a view to the debouche of the Ohio and Erie canal into Lake Erie, but not for a harbor at its mouth separately from that work.

Will you be pleased, sir, to furnish the information, to enable the Bureau to answer the resolution?

Respectfully, sir, your obedient servant,

ROBERT HOWLE.

CITY OF WASHINGTON, *June 23, 1834.*

SIR: I have very respectfully to request that I may be relieved from the duty of engineer of the Potomac Bridge, and that you will allow me to express my sense of the obligations I am under for the confidence and support which I have uniformly received from the Secretary of the Treasury in all things connected with the particulars of my duty.

With very sincere respect, I have the honor to be, &c.,

J. K.,

Lieut. Col. of the corps of Topographical Eng.

Hon. R. B. TANEY,

Secretary of the Treasury.

TOPOGRAPHICAL BUREAU,

Washington, July 8, 1834.

SIR: You will hold yourself in readiness to make the survey applied for in the enclosed copy of a communication to the Hon. Secretary of War, as soon as the season will admit of field operations in that quarter.

In addition to the survey, a general knowledge of the capacity of Cape Fear river, up to the point at which the survey will commence, ought to be obtained, and also a similar knowledge of the Waccamaw to the point where the canal line will join it.

You will, in the meantime, attend to the back work you have in hand, and submit to this Bureau an estimate of the probable expense of the survey now assigned to you.

Respectfully, sir, your obedient servant,

J. J. ABERT,

Lieut. Col. Topographical Engineers.

Lieut. Col. J. KEARNEY,

Topographical Engineer, Washington.

[Resolution No. 1.]

Whereas the Winchester and Potomac Railroad Company have found it impracticable to make the railroad through the grounds belonging to the United States at Harper's Ferry, agreeably to the exact tenor of the joint resolution passed for their benefit at the last session of Congress:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the said Winchester and Potomac Railroad Company are hereby authorized to complete said railroad, as now located through said grounds, on paying the value of any improvements injured by the road, or giving authority to replace them in other positions, should they be deemed by the President of sufficient importance to be paid for or removed: *Provided, however,* That the road shall be constructed in such place, as far as it passes through the public grounds at Harper's Ferry, as may be approved by the President.

Approved: January 27, 1835.

For making a survey from the southern debouche of the Dismal Swamp canal, down the Pasquotank river to Elizabeth, thence to Croaton sound, Pamlico, and other sounds, near the coast of North Carolina; and thence by the most practicable route to Winyaw bay, in South Carolina, with a view to determine the practicability of opening an inland communication for steam navigation, from the Chesapeake bay to Charleston, South Carolina, ten thousand dollars.

Approved: March 3d, 1857.

CONGRESS OF THE UNITED STATES—IN THE HOUSE OF REPRESENTATIVES,
April 9, 1838.

On motion of Mr. McKay,

Resolved, That the Secretary of War be directed to communicate to this House the report of the engineer charged with making the survey from the southern debouche of the Dismal Swamp canal to Winyaw bay, in South Carolina, with a view to determine the practicability of opening an inland communication for steam navigation from the Chesapeake bay to Charleston.

Attest:

W. S. FRANKLIN, *Clerk.*

CONGRESS OF THE UNITED STATES—IN THE HOUSE OF REPRESENTATIVES.
April 16, 1838.

On motion of Mr. C. Shepperd,

Resolved, That the Secretary of War be required to transmit to this House, the chart of the survey of Core sound, in North Carolina, made under the superintendence of Col. Kearney.

Attest:

W. S. FRANKLIN, *Clerk.*

BUREAU TOPOGRAPHICAL ENGINEERS,

Washington, August, 25, 1838,

SIR: It becomes my duty to call your attention to the 31st section of the law to increase the present military establishment, by which the connexion of any officer with the civil engineer operations of a State or company, the tendency of which is to separate him from the immediate duties of his corps, is prohibited. By a provision in the law, (a copy of which is enclosed,) officers are allowed to continue on their duties with States or companies "not exceeding one year, unless the convenience of the service will admit of their withdrawal sooner.

You will therefore apprise the State or company which you may be at present serving of the provisions of this law, that timely arrangements for your final withdrawal may be made; and if "the convenience of the service" upon which you are engaged will admit of it, you will terminate your present connexion sooner than the limit contemplated by the law, and report the same accordingly.

Very respectfully, sir, you obedient servant,

J. J. ABERT,

Lieutenant Colonel of Topographical Engineers.

Lieutenant Colonel J. KEARNEY,

Corps of Topographical Engineers.

BUREAU TOPOGRAPHICAL ENGINEERS,

WASHINGTON, March, 18, 1839.

SIR: A board of inspection, to consist of Lieutenant Colonel James Kearney, of the corps of topographical engineers, and Henry Smith, esq., superintendent of the harbor improvements western end of Lake Erie, will convene at Cleveland, Ohio, during the first week of April next; and will, with as little delay as practicable, inspect the following works:

1. Works at the harbor near the mouth of the river Raisin; H. Smith, esq., agent.
2. Piers at La Plaisance bay; H. Smith, agent.
3. Removing obstructions at the mouth of Black river, Ohio; C. Reed, agent.
4. Improvements at the mouth of Huron river, Ohio; J. B. Wilbor, agent.
5. Removing obstructions at Conneaut creek, Ohio; A. Dart, agent.
6. Removing obstructions at Ashtabula creek, Ohio; M. Hubbard, agent.
7. Improvement of Cleveland, harbor, Ohio; H. D. Dodge, agent.
8. Removing obstructions at Grand river, Ohio; J. A. Potter, agent.
9. Removing obstructions at Cunningham creek, Ohio; Robert Harper, agent.

10. Road from La Plaisance bay to the Chicago road ; H. Smith, agent.

11. Improvement at the mouth of Vermilion river, Ohio ; J. Bowes, agent.

The inspection will embrace the general plan of the works, the object to be accomplished, and the probabilities of success.

Cost up to the time of inspection and probable cost to complete the same. Modifications to be recommended, and anticipated advantages from the same. Effects which have already resulted, and present condition of the works. Influence of the improvement upon the agriculture of the adjacent country and commerce of the lakes ; also the advantages of these improvements in reference to measures of defence or means of annoying an enemy.

Complaints have been made against some of the agents. The papers in reference to these are enclosed, and will also be a subject of investigation by the board. The board will bear in mind, that while a clear and faithful fulfilment of the duties of disbursing is a necessary qualification in every agent, and that no prevaricating execution of these duties can be tolerated, yet eminent qualifications in this respect do not constitute a competent agent. Where such important interests are involved, and such large sums expended, it is not sufficient that expenditures should be faithfully made and be properly accounted for ; they must also be made judiciously ; and this cannot be done unless the agent, in addition to the integrity of his character, possesses likewise the requisite professional knowledge, as the agent is also the engineer of the work.

I cannot too earnestly call the attention of the board to a rigid execution of this part of its duties. It is not merely the professional reputation of the superintending corps, but the very existence of the system of these improvements, which depends upon it. In vain may judicious plans be adopted, and adequate appropriations be granted, unless they are carried into effect with the requisite intelligence as well as integrity.

Full reports in detail will be expected of the board, not merely of the points enumerated, but of all others which, in its judgment, may be necessary to the subjects committed to investigation.

As soon as the tour of inspection has been completed, the board will return to Detroit for the purpose of making its report, and will there await further orders.

Mr. Bowes, the local agent at Vermilion, will be directed to join the board, in case, in his judgment, he can separate himself from his work for that purpose.

Very respectfully, sir, your obedient servant,

J. J. ABERT,

Colonel Topographical Engineers.

Lieutenant Colonel JAS. KEARNEY,

Corps of Topographical Engineers.

Fourth quarter, 1856, is substantially this voucher.

Dr. The United States, to Lieutenant Colonel Jas. Kearney, corps of topographical engineers, on account of sundry harbor on Lake Erie, &c.

To his allowance of \$1 50 to meet extra expenses as a member of the board of inspection of sundry harbors on Lake Erie, viz: From July 26, 1839, to February 17, 1840, inclusive, 207 days, at \$1 50 per day..... \$310 50

See letter of Topographical Bureau, dated June 12, 1839, granting allowance to members of the board to meet extra expenses.

See Mr. Smith's (general agent) account for distribution of allowance to the several appropriations.

In substance this voucher was sent with my account, Fourth quarter, 1856.

Dr. The United States, to Lieutenant Colonel Jas. Kearney, corps of topographical engineers, on account of certain sundry harbors on Lake Erie, &c :

To his allowance of \$1 50 per day, to meet extra expenses as a member of the board of inspection of certain harbors on Lake Erie, viz: From July 26, 1839, to February 3, 1840, inclusive, 207 days, at \$1 50 per day, deduct amount received on this account from Henry Smith, general agent.. \$310 50

See letter of Topographical Bureau, dated June 12, 1839, granting an allowance to members of the board to meet the extra expenses.

See Mr. Smith's (general agent) account for distribution of allowance to the several appropriations.

Refer to Mr. Bowes, a member of the board, to Mr. Potter, its secretary, and to Mr. R. D. Cutts, who assisted Colonel Kearney in completing reports.

Refer to Mr. McPherson's memorandum.

BUREAU OF TOPOGRAPHICAL ENGINEERS,
Washington, April 4, 1845.

The duty of superintending the survey of the lakes is hereby assigned to Lieutenant Colonel James Kearney. Capt. W. G. Williams will turn over to Lieutenant Colonel James Kearny, all documents, drawing instruments, and apparatus, belonging to that survey. He will also direct all officers employed upon it to report to Lieutenant Colonel Kearney. He will also turn over to Lieutenant Colonel Kearney, the funds in his possession belonging to that survey, except such as may be wanted to close his accounts up to the end of the first quarter of 1845.

Captain Williams is hereby specially assigned to the completion of the survey of Green bay. Although the results of this survey fall naturally in as part of the survey of the lakes; yet, as it has to be made from a different appropriation, it will constitute a distinct command. Its means of connexion with the survey of the lakes having

been already established by Captain Williams, there will be no difficulty hereafter in uniting the whole into one map.

Respectfully, sir, your obedient servant,

J. J. ABERT,

Colonel Corps of Topographical Engineers.

Lieutenant Colonel JAS. KEARNEY,

Corps of Topographical Engineers, Buffalo, N. Y.

WASHINGTON, *January 25, 1856.*

MY DEAR COLONEL: I am prosecuting a claim for brevet pay prior to my promotion to the lieutenant colonelcy of my corps, and I am advised that the decision of President Monroe, in the case of General Macomb, chief engineer, and the argument and statement of the general in his case, may have an important bearing upon mine. A copy of the decision of President Monroe is in my possession, but the statements upon which it was founded are not to be found here. They are supposed to be in your possession, you having paid General Macomb under the decision in question. You would greatly oblige me if you could furnish me with an authenticated copy of these papers, and I know you will cheerfully do so if you can come at them, and you will greatly add to the favor if you can find yourself at liberty and leisure to throw any light upon my path by advice or suggestion, touching the general history and growth of brevet pay in our service, which spread out from a very small affair in 1818-'19, until it came finally to cover everybody, I believe, but me.

But I am not done with asking favors of you. I find amongst my old papers, a rough draft which purports to be a certificate of Gen. Macomb, stating it as his opinion that my command was then equal to my brevet rank of lieutenant colonel. This rough copy of a certificate is without a date; but it must have been drawn up, of course, subsequent to 1826. I recollect that I drew pay from you on the strength of it; but Major Eaton, the then Secretary of War, put an end to that sort of thing by ordering me, and others in like predicament, to refund, which we did perforce, and in my case under protest; and so I refunded to the amount of one of your checks, \$293 20, and thenceforth to the date of my promotion in my corps, I drew a major's pay only. But Major Bache, who had also refunded, was more lucky or was more in favor than I; for, by Mr. Poinsett's permission, he again drew his brevet pay and retained it. Now, if you have the original of the certificate I am speaking of, viz: General Macomb's opinion in my case, you will greatly oblige if you will let me have a copy of it.

Very truly, &c.,

JAMES KEARNEY.

Lieutenant Colonel T. P. ANDREWS,

Deputy Paymaster General.

Rough memorandum, drawn up at Detroit, chiefly from memory, in the winter of 1856 and 1857, and intended for Mr. Burgess.

I have your letter of the 11th, for which I owe you many thanks. I see my way now.

1. The first code of army regulations I have any knowledge of, probably the first ever issued to the army, was that of 1813, drawn up under the authority of the act of March 3, 1813, for the better organization of the general staff; I have a copy of this, and you will find an elaborate opinion of Mr. Attorney General Berrien, in connexion with it, and on the authority of the President of the United States, to make regulations, &c., in the first edition of the Opinions of the Attorneys General, pages 691, 695, 696, &c.

2. The next *regulations* in the order of time, are those of 1816, (I have a copy of them at home,) have the sanction of the act 24th April, 1816, the ninth section of which provides that the regulations in force before the reduction of the army be recognized, as far as the same be applicable to the service, subject, however, to such alterations as the Secretary of War may adopt, with the *approbation of the President of the United States*. On this we have the opinion of Mr. Attorney General, W. Wirt, for which see Opinions of the Attorneys General, (1st ed.) page 411.

3. Military order or regulations, dated the 8th of May, 1818, concerning which see Opinions Attorney General Wirt, page 410, 411, 412; also, Regulations January, 1820, agreeably to act of April 24, 1816. The regulations of 1821, compiled by General Scott, had the sanction of the act of 2d March, 1821, which was withdrawn by the act of 7th May, 1822, but they still had the sanction of the President, which was all sufficient where they did not conflict with the law. See Opinions of Attorney General, pages 411 and 412, for Mr. Wirt's opinions, wherein he considers the power of the Secretary *per se*, or under the direction of the President of the United States, to make regulations; also page 696 for Mr. Berrien's opinion.

4. General Scott's Regulations 1825. These and the regulations of 1821 or 1822 are in Mr. Burgess's hands, I believe, and they have undoubtedly the sanction of the President of the United States. Regulations 1827, concerning brevet pay.

5. Regulations of 1835 or 1836.

6. Regulations of 1840 or 1841.

7. Regulations of 1846 or 1847. There is some blundering here respecting the dates of Nos. 5 or 6, or 7, for which see the volumes which are in my possession at home, or may be found in the Bureau; I think they are the Auditor's blunders; I forget the particulars.

8. Regulations of 1841. Examine the order of publication.

9. Regulations of 1846 or 1847, affect the Adjutant General's department chiefly. I have the volume at home.

10. Regulations of October 12, 1852, for the Ordnance department, under authority of the act of February 8, 1815.

11. There is now in course of being issued, regulations for each of the staff departments separately. The four which I have seen have

each the sanction of the President, as vouched by the Secretary of War. They have since been collectively published.

J. K.

If in his decision, Mr. Conrad's idea is that the duties performed by Lieutenant Colonel Kearney, might have been performed as appropriately by a major, the fact may be admitted without invalidating the claim, unless it can be shown that they were inappropriate to the rank of lieutenant colonel, which I think cannot be done—the command of the two grades being the same, with reference to the question of pay and emoluments. If the command was not *inappropriate* it was *appropriate*, and Lieutenant Colonel K. was on duty and had a command according to his brevet rank of lieutenant colonel, and should receive the pay and emoluments of that rank.

But all doubt on this question is removed by the decision of the War Department, in the case of Brevet Lieutenant Colonel Abert, of the topographical engineers. This case is in fact identical with the one now under consideration. It is to be found in the document No. 263 already referred to as follows :

“Colonel Abert's claim.”

“For difference of pay between the rank of major and that of lieutenant colonel, from the 22d of November, 1824 to the 26th of May, 1826, during which period he held the rank of lieutenant colonel by brevet. Duties : surveys for the defences of Kennebec and the coast of New Meadow river to Townsend bay, Maine ; several lines of internal communication between the Kennebec and Androscoggin, the Androscoggin and Connecticut, the Connecticut and Lake Champlain ; surveys in reference to the Chesapeake and Ohio canal. Not on furlough or leave of absence, or waiting orders during any part of the time.

“J. J. ABERT,
“*Col. Corps Top. Eng., Washington.*”

“WASHINGTON, *March 23, 1841.*

“Colonel Abert held the brevet rank of lieutenant colonel during the within period referred to in his account, and exercised a distinct command, embracing highly important and extensive duties. His claim seems to come within the established precedents, and its allowance as in other similar cases, is respectfully recommended.

“A. MACOMB,
“*Major General, Commanding.*

“This claim is similar to the claims of Majors McNeill and Bache, as allowed by Mr. Poinsett.

“N. TOWSON,
“*Paymaster General.*

“Allowed : JOHN BELL.”

December 29, 1821. Mr. Wirt's history of brevet rank and pay as applied to Generals Scott and Gaines. This during Mr. Calhoun's

administration of the War Department, and while General Bown was in command of the army. *Vide* Attorneys General's Opinions, pages 396, &c.

June 5, 1822. On General Macomb's case, page 410, &c. Mr. Wirt's opinion: "Perfectly competent to the President of the United States to declare by his own orders what should be a command according to brevet rank."

September 21, 1822. Same subject. Mr. Wirt, page 421, &c.

March 27, 1823. By army regulations of 1821, *a separate command* is defined to mean, among other things, a particular post; *vide* Mr. Wirt, page 452.

July 2, 1829; page 690, Mr. Berrien says that, where a question has been deliberately settled, it does not seem to be proper for the Secretary of War to disturb it, unless a very strong and pressing case should be presented for consideration.

July 18, 1829; page 692, Mr. Berrien says that the act of 1812 gave brevet pay ONLY to officers having the *chief* command of *separate posts, districts, or detachments*. The act of 1818 dispenses with this requisition, and extends the allowance to all brevet officers "on duty, and having a command according to their brevet rank." It does not limit the allowance to the officer *commanding in chief*, at a separate post, but extends it to *all brevet officers having commands appropriate to their brevet rank*. In this particular it enlarges the provisions of the act of 1812. In my opinion (page 693) the act of 1818 restricts, enlarges, and thus virtually supersedes the act of 1812. This is a very elaborate opinion.

April 3, 1835. M. Butler, in speaking (page 992) of the claim of Captain Delafield, says, "if any other construction (than the one he proposes) has been settled by usage, I should think it safest to adhere to it." Page 1032, "for which compensation is not specifically provided by law," in the language of the Regulations of 1833, (what is it about?).

Page 1361, October 21, says act of 3d March, 1839 provides that "no officer in any branch of the public service, or any other person whose salary or whose pay and emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation shall be authorized by law."

BUREAU OF TOPOGRAPHICAL ENGINEERS,
Washington, August 17, 1858.

SIR: In answer to your letter of the 12th inst., asking a reference to certain reports made by Lieutenant Colonel James Kearney, I have the honor to state, that his report of survey of the route of a canal by the valley of Conneaut and Elk creeks, and his report of reconnoissance of a road from Uniontown, Pennsylvania, to Pittsburgh, will be found printed as Ho. Reps. Doc. No. 239, 1st sess., 22d Congress.

His report upon the condition of the improvement of the Tennessee river at the Muscle shoals, dated April 14, 1836, will be found printed as Ho. Reps. Doc. No. 222, 1st sess., 24th Congress.

Respectfully, sir, your obedient servant,

J. J. ABERT,
Col. Corps Top. Engineers.

JOHN D. MCPHERSON Esq.,
Deputy Solicitor Court Claims, Washington.

ENGINEER DEPARTMENT,
Washington, January 17, 1825.

SIR: I have the honor to present to you an estimate of the expense which will attend the operations of the board of internal improvement during the current year, predicated on the supposition that the board will be employed in reconnoitering and examining the different routes for the great national road from the seat of government to New Orleans, and that all the topographical engineers that can be spared from the survey of the coast, together with Mr. Schriver's brigade, will be engaged in continuing the survey of the routes for a canal communication between the tide-waters of the Chesapeake and Lake Erie, with a view to its completion, with the exception of one brigade of topographical engineers, which will be engaged in surveying the routes between Buzzard's and Barnstable bays. The sum required for these operations is \$38,744, from which deducting the sum of \$10,177 the balance remaining on hand from the last year's appropriation applicable to these objects, there will be left the sum of \$28,567 to be provided, as will more fully appear by the accompanying statements.

I have, &c., &c.,

ALEX. MACOMB,
Maj. Gen'l and Chief Eng.

Estimate of expense of examinations and surveys for roads and canals for the current year 1825.

One military brigade consisting of one chief and five assistants; extra allowance for six officers, at \$1 50 per day for one month, is \$270, half of which is chargeable to military service and half to internal improvement.....	\$135 00
Twenty men at \$30 per month.....	600 00
Transportation and contingencies per month.....	150 00
One brigade for one month is.....	\$885 00
Three military brigades, at \$885 per month, for 7 months, is \$18,585 00	
One civil brigade, consisting of one chief, at per month.....	\$110 00
Four assistants, at \$4 per day, for one month...	540 00
Eighteen men, at \$30 per month.....	480 00
Transportation, contingencies, &c.....	150 00
For one month.....	\$1,280 00

One civil brigade for 7 months.....	\$8,960 00
Allowance to 2 civil engineers for 1 year, at \$3,600 each	7,200 00
One assistant civil engineer attached to the board, for one year, at \$110 per month.....	1,320 00
Allowance of two members of the board, for 365 days, at \$4 50 per day for both, equal to	1,642 50
Three assistants, at \$1 50 each, for 7 months, \$963, half...	481 50
Guide, stationary, postage, wagon and fresh horses on the road	495 00
Total.....	\$38,744 00

Recapitulation.

Three military brigades.....	\$18,585 85
One civil brigade.....	8,960 00
Repairs and instruments.....	60 00
Pay of one civil engineer attached to the board.....	1,320 00
Pay of two civil engineers.....	7,200 00
Extra allowance to two members of the board.....	1,642 50
“ “ to three assistants.....	481 50
Contingencies, wagons, fresh horses, stationary, &c.....	495 00
Total.....	\$38,744 00
On hand remaining of the last year's appropriation.....	10,177 00
Appropriation required for the surveys of the present year	\$28,567 00

I have &c.

ALEX. MACOMB,
Maj. Gen'l and Chief Eng.

Hon. J. C. CALHOUN,
Secretary of War.

BUREAU OF TOPOGRAPHICAL ENGINEERS,
August 18, 1858.

I certify that the foregoing is a true copy from the record in this office.

J. J. ABERT,
Col. Corps Top. Eng.

WASHINGTON, *June 26, 1826.*

SIR: Presuming that, within about three months, you will have finished the survey of the route of the canal from Pittsburg to Lake Erie, through Conneaut lake, we deem that during the remainder of the season you might commence the survey of another route. Therefore, with the authorization and request of the Engineer department, we have the honor to forward to you the following instructions:

The route of canal herein contemplated is southwardly the prolongation of the section of canal you are now surveying from Lake

Erie to Conneaut Lake; it commences at Conneaut lake, descends in succession the valleys of Conneaut lake outlet, French creek, and Alleghany river, and terminates at Pittsburg.

This route is to be compared with that you are now surveying, and being possessed of the advantages of receiving from the Alleghany mountains many important tributary streams, it is required from you that the same care be bestowed upon this route as you have done upon the other. Therefore, all the general instructions you have received in relation to this latter are equally applicable to the route under contemplation, and it must be surveyed and located as minutely as you have done for the route you are now surveying.

The line of canal referred to in these instructions should be run from the northwest corner of Conneaut lake, down the west side of that lake, and down its outlet to French creek; thence down French creek and the Alleghany river to Pittsburg.

Taking the surface of the water of the lake at the lowest stage as the surface of the water in the canal, the summit level should be carried over the most favorable ground, along the west side of Conneaut lake, and down the valley of the outlet to French creek. The mode of feeding this summit will then be a proper subject of investigation; and it should be ascertained whether it will be best to keep the line of canal on the right bank of the outlet creek, to avoid an aqueduct-feeder which would otherwise be necessary; or whether the canal, after receiving its supply from French creek, should begin its descent to lower levels, or be continued at the summit elevation, with a view to making Little Sugar creek, Big Sugar creek, and the Alleghany river itself tributary to the summit. In the course of this investigation the proper line for the canal to the mouth of French creek, the best mode of bringing in the several feeders, the true situations of the dams necessary to hold back the waters of the feeders, will, of course, be determined.

From an examination made in 1824 by part of the board of internal improvement, of the Alleghany river from Franklin to Pittsburg, it appears that, as to the nature of the ground for canalling, there is little if any difference between the two shores, there being but about ten miles on each side where the bluffs are close upon the river, and of these distances, but about three miles on the right bank and four and a half on the left can be considered as requiring much extra labor or expense.

There being this equality as to the facilities of canalling, the circumstance of all the valuable streams for feeders coming in from the eastward, indicates pretty clearly that the left bank should be preferred for the line of canal. But as it will not be difficult to conduct these feeders across the river, nor to derive a supply of water from the Alleghany itself by means of dams, and as there may be reasons for preferring the right bank, depending on the nature of the ground; therefore, while the surveys and levellings are making of a line of canal on the left bank, an experimental line should also be carried down on the right bank.

From the information collected by these operations a judgment may be formed of the respective advantages of the two banks; and when

the canal comes to be finally located, it may be fixed, without much additional labor, on that side of the river which, everything considered, is found to be most suitable.

It is presumed that the most difficult points on the river may be passed with less expense than would be required to cross by an aqueduct; but as a more minute examination than the board were enabled to make may lead to a different conclusion, great attention should be paid in the course of the survey to every local circumstance in the vicinity of the abrupt shores which has any relation to the stability and expense of aqueducts, or to the mode of overcoming the obstacles.

With a view to the supply of the inferior levels of the canal, lines should be run up the several rivers and creeks which it is desirable to introduce, ascending at the rate of three inches per mile to such points as may be most proper for dams; noting all such circumstances as relate to the construction of the dam, the stability, the means of passing off the superabundant waters, and the direction and length of the feeders. The line of feeders up the Kiskiminitas, Toby's creek, and Alleghany river, should be so located that they may serve respectively as lower levels of navigable canals along those valleys.

In fixing the lines of the canals and feeders, care should be taken to place them as much as possible out of the reach of danger from freshets and floating ice; and in locating dams in the Alleghany, should any be necessary, the means of locking through them should be noted with a view to keep uninterrupted the navigation of the river.

In every part of the lines, whether for canals or feeders, every important local circumstance should be noted—the proper places for dams, aqueducts, locks, culverts, and bridges; the best way of bringing in every tributary to the supply of water, &c., &c.

As opportunities occur, all the streams which may aid the supply should be gauged.

The following are the results of measurement made by the board of some of the streams :

	Cubic feet.
August 16, 1824—Conneaut outlet, at the bridge....	6.293 per sec.
August 17, 1824—French creek, at Meadville.....	221.008 “
August 27 and 28— “ “	229.972 “

I have the honor to be, sir, very respectfully, your obedient servant,

BERNARD, *Brigadier General*.

In behalf of the Board of Internal Improvement.

Major JAMES KEARNEY,

U. S. Topographical Engineer.

IN THE COURT OF CLAIMS.

JAMES KEARNEY *vs.* THE UNITED STATES.

Brief.

I. In the difference between the pay and emoluments of major and lieutenant colonel from the 29th of April, 1826, to the 6th of July, 1838, during which time he was lieutenant colonel by brevet, \$3,084.

1. Certificate of Colonel Abert—

“This is to certify that during the period of the within account Brevet Lieutenant Colonel James Kearney directed the operations of surveying parties at the same time at separate and distant places, as appears from the records of this office, namely, from the 29th of April, 1826, to and inclusive of the 6th of July, 1838; that his command for said time was equal to that of lieutenant colonel of the corps performing similar services, of equal responsibilities, embracing important and extensive duties. His claim for brevet pay during that time seems to me to come within established precedents in similar cases.

“J. J. ABERT,

“Colonel Corps of Topographical Engineers.

“BUREAU TOP. ENGINEERS, September 27, 1854.”

2. Colonel Abert's statement, June 11, 1851.

3. Act of April 16, 1818, (3 Stat. at Large, 427,) “That the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty and having a command according to their brevet rank, and at no other time.”

4. General Macomb's case. See report, 2d session 25th Congress, H. of Rep., No. 5.—Mr. Monroe's statement.

5. Colonel J. J. Abert, allowed by Mr. Bell, Secretary of War.

6. Major McNeill, corps of topographical engineers, allowed by Mr. Poinsett.

7. Major H. Bache, corps of topographical engineers, allowed by Mr. Poinsett.

8. General George Gibson, allowed by Mr. Poinsett.

9. Major Baker's advance, allowed by Mr. Poinsett.

[See rep. 263, 2d sess. 27th Cong., p. 11.]

II. Double rations from November 1, 1832, to July 6, 1838, resulting from brevet rank, \$625 40.

See statement and argument among the papers.

See decision of General Jackson and John Robb, acting Secretary of War, in Colonel Abert's case, 1831.

See report No. 263, H. of Rep., 2d sess. 27th Congress.

See for regulations “double rations,” 2d sess. 27th Congress, report No. 263, p. 32; No. 9, p. 34; No. 17, p. 35; No. 18.

III. Forage as major from May 1, 1816, to June 30, 1820, \$1,424.

The objection of Comptroller to pay for forage for horses, claim so old; Colonel Kearney certainly in service. See affidavits of Mr. McClery and Mr. Callan.

Act of March 3, 1813, 2 Stat. at Large, p. 819, secs. 3, 8, topographical engineer, pay on account of major of cavalry.

Act of April 12, 1808, 2 Stat., 482, sec. 4, fixing pay of cavalry officers.

Act of April 24, 1816, 3 Stat., 298-9, acquiescing in sec. 9 and sec. 12.

Regulations of 1816, p. 84 of reg.

IV. Per diem allowance in addition to usual allowances for quarters and fuel, while engaged upon an extended line of improvement,

viz: the Eastern Shore railroad, Maryland, from April 14, 1836, to March 28, 1837, inclusive, 349 days, at \$1 50 per day.....	\$523 50
For the same while engaged upon an extended line of improvement in North and South Carolina from March 29, 1837, to April 16, 1839, 749 days, at \$1 50 per day....	1,123 50
	1,647 00

The foregoing under regulation of the Secretary of War, under sanction of the President, of July 16, 1836.

1. See "rule for surveys," adopted by General Jackson, 1829.

2. Regulation of the War Department, (Gen. Cass,) July 16, 1836; submitted to the President, (Gen. Jackson,) and July 19, 1836, approved by him.

3. J. J. Abert to Colonel Kearney, April 9, 1836; appointed chief engineer to superintend survey of railroad on Eastern Shore of Maryland.

4. Act of Congress appropriating \$1,000 for survey of inland route from Chesapeake bay to Charleston, S. C., approved March 3, 1837.

5. Colonel Abert to Colonel Kearney, March 28, 1837, ordering him to make the surveys under the foregoing act of Congress.

6. Colonel Abert to Colonel Kearney, October 19, 1837.

See report 263, 2d session 27th Congress, p. 34, No. 17; p. 35, No. 18.

See order of Secretary of War, February 23, 1842. Transcript.

V. For per diem allowance as member of the board of internal improvement, in pursuance of the order of the War Department of June 15, 1830, in reference to the Muscle shoals improvement, from January 30, 1830, to March 28, 1831, being 423 days, at \$4 50 per day \$1,971 00

For per diem allowance as a member of the same board, in pursuance of the regulations of the Secretary of War of June 30, 1830, in relation to the surveys and report on the Pennsylvania and Ohio improvements, and also in continuation of the Muscle shoals improvement, from March 29, 1831, to April 14, 1836, inclusive, 1,843 days, at \$4 50 per day..... 8,293 50

10,264 50

From which is to be deducted the amount received for quarters, fuel, per diem, transportation, to be ascertained at the Treasury Department within the periods, &c.

1. Colonel Gratiot to Colonel Kearney, January 15, 1830. The Secretary of War directs that he shall be associated as a member of the board of internal improvements in preparing the report.

Doc. 32, 2d sess. 18th Congress.

Doc. 18, 1st sess. 28th Congress, H. of R., War Dep't.

TOPOGRAPHICAL BUREAU, *January 14, 1832.*

SIR : I transmit you copies of resolutions in relation to a survey of the Potomac within the District of Columbia, and which is now placed under your direction.

You will make your arrangements to execute the same as soon as practicable.

Respectfully, sir, your obedient servant,

J. J. ABERT,

Lieutenant Colonel Topographical Engineers.

Lieut. Col. JAMES KEARNEY,

U. S. Topographical Engineer, Washington, D. C.

Finally, the memoir, maps, and profiles should give all the information necessary to direct the final location of the canal route.

There should be frequent permanent bench-mark made in the course of the survey, say, at least three or four during each day's survey; and they should be carefully designated in the notes, in order that the additional surveys, when necessary, may be taken up in any part of the line. When no convenient spot occurs in the line pursued whereon to make those marks, an offset should be made to the nearest suitable object.

In all the details of the operations and plotting of the maps, the principles laid down in the general instructions, here enclosed, should be followed. It is, besides, found expedient to request all the officers employed in the investigations to conform, in writing, in the measure of altitude, feet, inches, tenths; in distances, miles, yards, feet, tenths, and not perches and chains; to ascertain the perfect correctness of the rule each employs by the *standard* at the War Office; to measure the flowing water in feet per second; the contents of reservoirs in cubic yards; their superficie in square yards. In the profile of the ground the axis should be divided into eighths of a mile. Whenever the line is along or near a steep ground, the angle of its slope should be taken.

In the absence of the board, you will apply directly to the Engineer department on all occasions of requisition.

It is expected and authorized that the brigades have the the work whenever the likeliness of the locality, in the summer or autumn, shall make the step necessary for the preservation of health. In this case the time should be employed in plotting the previous work; resuming the field as soon as possible.

For the better elucidation of the views of the board, in running this route of canal, herewith is annexed a copy of their report of the last year.

Application is to be made to the Engineer department for the organization of the brigade.

The operations on the ground should commence on the 20th of April next.

Herewith are annexed, a sketch of the country through which passes

the route of canal; an instruction to measure and gauge the flowing waters.

The letters to the board may be addressed to the city of New Orleans until the 10th of May next, and afterwards to the seat of government.

We have the honor to be, sir, very respectfully,

Your obedient servants,

BERNARD,

Brigadier General.

JNO. L. SULLIVAN,

DAVID SHRIVER, JR.,

Members of the Board of Internal Improvement.

HOUSE OF REPRESENTATIVES, *January 13, 1829.*

Resolved, That the Secretary of War be directed to communicate to this House the report of the engineer employed to make a reconnoissance of a mail and military road from Union town, through Pittsburgh, to Lake Erie.

Attest:

M. ST. CLAIR CLARKE,

Clerk House of Representatives United States.

Referred to Colonel Kearney.

TREASURY DEPARTMENT,

Second Auditor's Office, September 28, 1857.

SIR: In compliance with your request of the 25th instaut, I herewith enclose a copy of the letter addressed to the Second Comptroller, on June 5, 1855, by the late Second Auditor, in the case of Lieutenant Colonel Kearney.

Very respectfully, your obedient servant,

T. J. D. FULLER, *Auditor.*

JNO. D. MCPHERSON, Esq., *Deputy Solicitor.*

WASHINGTON CITY, *March 16, 1827.*

SIR: With a view to complete the surveys necessary to determine upon the most eligible route for the contemplated Ohio and Erie canal, I have the honor to forward to you, with the agreement of the Engineer department, the following instructions:

1. *Deviation of the Mahoning Route.*

This deviation is intended from Warren, or its vicinity, to the Portage summit, and hence to Cleveland, through the valley of the Cuyahoga river. Two routes are to be examined and surveyed: one ascending the valley of Silver creek, to strike the Cuyahoga at the

Rapids, where a dam should be erected to form a reservoir destined to feed the canal ; from the Rapids the route would reach the Portage summit, by keeping the proper level, and following, on the left side of the valley, the best ground. The other route would ascend one of the southern head branches of the Mahoning, and reach the most favorable point of depression of the summit-ground between the valley of the Cuyahoga and Mahoning ; from this point, considered a summit-level, the canal would descend to the Portage summit, in following the best ground along the left side of the Cuyahoga valley. This route is to be fed from Cuyahoga river at the rapids, therefore a feeder is to be surveyed from the dam herein above mentioned to the summit-level of said route.

Previously to any survey, it will be proper to make a reconnoissance of the country, in order to ascertain, at sight, and as far as practicable, which of the two routes is most likely to claim a preference ; which of them will require a complete survey, or experimental lines only. In case of material doubt, both routes should be completely surveyed.

It being necessary that you should be acquainted with what has already been done in relation to this route of canal, I annex to the present directions the copy of an examination made, in 1825, by captain Wm. G. McNeill.

In order to assist you in the connexion of the Mahoning route, both with the above deviation and with the Big Beaver route, I forward to you a copy of captain McNeill's report on the Mahoning route, as also a copy of the instructions he had received respecting the survey of this latter route.

I shall also refer you to the printed report of the board, dated February 2, 1825, marked A, in which are submitted (pages 54 and 55) some considerations respecting several routes which might connect the Mahoning with the Cuyahoga. It is desirable that your examination and surveys should settle the comparative degree of practicability of these routes, and also determine whether the Portage summit might be made the very summit-level of the connexion herein contemplated ; the relative elevation of the Portage and the supply of water to be derived from it will settle this question. The relative elevation will also determine whether the two routes herein above mentioned shall pass by the Portage summit or below it.

When at the Portage summit, you will inquire as to the elevation of this summit above Lake Erie, and also procure the best information with regard to the distance from said summit to Cleveland harbor, by either side of the Cuyahoga valley.

It is highly important that you should examine this portion of the valley, with a view to determine whether the Mahoning route might take this course to terminate at Cleveland, after its having ascended one of the head branches of the Mahoning and descended to the Portage summit. Should this examination impress upon your mind the advantage of this route over those surveyed by your brigade, or should you deem it necessary that a survey should be made to ascertain the comparative merit of said route, you would apply to the Engineer department for further instructions.

2. *Continuation to the Port of Erie of the route of canal through French Creek.*

Taking the upper end of the feeder from French creek, as a point of departure, you will ascend the valley of this stream as far up as the mouth of Le Bœuf creek; hence you will ascend this creek up to the point where it would yield a sufficient supply of water to feed the canal. From such a point, the route will cross over the ridge to descend to, and terminate at, the port of Erie. The survey will consist of experimental lines of levels, running through the ground which a previous examination will have determined as the most favorable to the canal. I must remark that this experimental survey is chiefly intended to ascertain the facts upon which are to be predicated the difficulties which might oppose the practicability of a canal across the ridge which separates the upper valley of French creek from Lake Erie.

3. *Embranchment of the Northern portion of the route through Conneaut Lake to the Port of Erie.*

The importance of the port of Erie demands that an experimental survey should be made, to ascertain the practicability of a canal connecting this harbor with the Conneaut lake route.

The route of such a canal will commence at Erie, at the mouth of Mill creek, and ascend the valley of this stream, with a view to reach such a level as to afford the facility of crossing, in succession, Walnut creek and Elk creek, at the points where short aqueducts might be had, and where dams might be erected to form available reservoirs. It must be observed that Elk creek, by making a considerable bend towards Erie, offers the means to obtain, at a convenient distance from Erie and from the main canal, a supply of water; it will also assist, perhaps, in keeping the route remote from the lake: circumstances which, in time of war, might become of some advantage to the security of this communication to Erie.

From Elk creek the canal will continue to and strike at some convenient point the Conneaut route, or main canal. The comparative supplies of water afforded on one side by the main canal, at the point of junction, on the other by Elk, Walnut, and Mill creeks will determine whether the canal shall receive a supply from the main canal, or the reverse. The survey will, therefore, after due investigations, be directed accordingly, taking, however, in consideration the circumstances of the ground. In either case, the aforesaid supplies of water must be ascertained with care, because on their quantum will rest, not only the practicability of the canal, but also the size of the profile to be adopted for the trunk of said canal.

I deem it unnecessary to request you to gauge with accuracy all the streams, the water of which might become available to feed the several canals herein contemplated; and I omit here the directions of details which are already given in the general instructions of the board.

During the performance of the duties assigned this year to your brigade, it is desired that you would make, with great care, the most full and minute inquiries, and collect their results, respecting the

prices of labour, materials, transportation, &c. Such valuable information will assist in the calculation of the elements upon which the estimate of the canal must be predicated.

Before carrying into execution the present instructions, I beg of you to submit them to the Engineer department.

I have the honor to be, sir, very respectfully, your obt. servt.,
BERNARD, *Brigadier General,*
Member of the Board of Internal Improvement.

Lieut. Col. JAMES KEARNEY,
Topographical Engineer, Washington City.

GEORGETOWN, *March 12, 1825.*

SIR: Agreeably to the orders of the Engineer department, dated March 8, 1825, we have the honor to send to you the following instructions, relating to a route of canal contemplated to connect the Ohio river with Lake Erie.

The route follows the right bank of the Ohio from Pittsburg to the mouth of Big Beaver, ascends the valleys of Big Beaver and Shenango, and descends to Lake Erie at the mouth of Elk creek. The summit ground is in the vicinity of Conneaut lake; the summit level of the canal must be supplied with water from French creek, and with water derived from a reservoir in Conneaut lake.

The investigation of the local facts should commence at this lake, which will be considered, in the first instance, as a part of the summit level. This summit-level should extend as far as it can be preserved northward of the ridge which divides Conneaut lake from Conneaut creek, and southward until it may be necessary to descend.

The levelling should commence at the surface of the lake, in low state, which then discharges, at the outlet below the bridge, a stream of six inches in depth. That bridge is at the northwest end of the lake.

From thence the line should be carried over the dividing ridge to the valley of Conneaut creek, allowing the canal to be five feet deep, and, of course, the deep cutting in the ridge five feet below the surface of the lake. The extent of that deep cutting will enable the board to determine whether it will be best to raise the surface of the lake, or lower the bottom of the canal. The elevation of the ground southward and westward of the lake will also be determined, together with the practicability of bringing in the feeder at a greater or less elevation. It will be also determined whether the summit level should be located higher than the lake, or the surface of the lake itself, as a part of the summit level, should be reduced in elevation; whether the summit level should be wholly separated from the lake, and the lake converted into a reservoir to be filled by the redundant waters of French creek.

In case that the surface of the summit level will conform to the natural surface of the lake, the line northward should be carried as far as ground may favor into Conneaut valley.

The Erie section will continue down the eastern side of the valley,

along the most favorable grounds for long levels, till it reaches the shore of Lake Erie, near or at the mouth of Elk creek. At this place, and above and below it, soundings should be taken in relation to the harbor. This harbor must be so situated as that the waters of Elk creek may be occasionally used to sweep out its entrance, should sands accumulate therein.

Under the impression that advantage may be taken of the favorable situation of Conneaut lake to form a reservoir, by raising a dam at its outlet and filling it by a feeder from French creek, a line should be run from this lake, ascending at the rate of six inches a mile, until it reaches a favorable place in French creek to build a dam and create a pond, whence the water may be drawn. This line of feeder should be, as well as the dam, high enough to fill the reservoir nine feet above low-water mark. In order to know the extent of the area of the reservoir, a horizontal curve should be run round it at this elevation, noting, at the same time, the place of another line six feet, and of a third line three feet above the same level at low water. On the map, the outline of the reservoir, the extent of surface, the content should be shown for each of these elevations. The embankment which may be necessary to retain the water, in each case should be noted and calculated.

The outlet creek from Conneaut lake should be surveyed and levelled down to its mouth, into French creek, with a view to try if a dam erected across French creek, at a proper elevation, would back the water into the summit-level. Were such result attainable, a feeder should be run from the top of the dam to the summit-level, with a descent of six inches per mile.

To complete the location of the summit-level, a line should be run southwardly, as before mentioned, from the northwest cove of the lake, to the head of Randolph's run, both to the east and west of a ridge or hill situated southward from the lake. From where these experimental lines meet, the summit level should be continued down the valley of Crooked creek, dropping the level at favorable places, for the location of locks, until it reaches the vicinity of Greenville.

Another experimental line should next be run, from the same point of departure on Conneaut lake, to gain the head of the valley of upper Shenango, down which the line should be carried to near Greenville, also, and to the point where the other line terminated.

In fine, a third experimental line of canal should be run, from the same point of departure before established, down the Gymatuning to its junction with the Shenango, observing, as before, the same attention to ground, and to suitable situation for locks.

As to the Shenango line, it should, from Greenville, continue down and along the Big Bend, till, turning westward, it comes to the mouth of the Gymatuning, where its level should be made to accord with that which, as a part of the Shenango and Gymatuning route, continues downward, towards the Ohio.

From the junction of the Gymatuning and Shenango, a line of canal should be run on both sides of the Shenango, down to the junction with the Mahoning, where a bench-mark should be made with reference to

a canal line up the Mahoning, the survey of which will be entrusted to Captain McNeill. The line should then be continued down on both sides of the Beaver to the Ohio.

Examination should next be made in order to connect the route of canal just indicated with the head of steamboat navigation, and the western extremity of the Chesapeake and Ohio canal, at Pittsburg. With this view, an experimental line should be run from a point above the falls of Beaver, at such a height as to avoid, if possible, the scarp of the bluff on the east side of the mouth of the Beaver, and continuing on the right bank of the Ohio to Pittsburg. But as it is not likely that a practicable line will be found by that process, it may be necessary to reverse the mode of operation, and, depending on the Alleghany river to supply the necessary water, to run a line up the right bank of that river and down on the left bank, to and from a point where a dam may be safely erected, and sufficient elevation gained for a feeder, with six inches per mile descent. Then to trace a line of canal from the mouth of the Alleghany to the mouth of Beaver.

If the most favorable ground for this feeder should be found on the east side of the Alleghany river, it may be equally convenient, because the Chesapeake and Ohio canal may be connected with the Ohio and Erie canal by an aqueduct leading from Pittsburg across the Alleghany.

In every part of these lines of canal, attention must be paid to every important local circumstance, the proper places for dams, aqueducts, locks, culverts, bridges, &c. ; the best way of bringing in every stream capable of being used as a feeder, &c. These lines of canals should be carefully kept out of reach of the freshets.

As opportunities occur, all the streams which may be made tributary to this canal, especially those near the summit-level, should be gauged at their lowest stage.

According to measurements made by the board last year, (1824,) the following streams have furnished the quantity of water here specified :

	Cubic feet, per second.
Outlet of Conneaut lake, 16th August, at the bridge	6 $\frac{293}{1000}$
French creek at Meadville, 17th do.....	221 $\frac{208}{1000}$
Ditto. 27th and 28th do.....	229 $\frac{972}{1000}$
Great and little Shenago, at Greenville, 16th	28 $\frac{650}{1000}$

The maps of the lines should be on a separate paper, on a scale of two inches to one mile. The general profile, also on a separate paper, on a scale of two inches to one mile, as to the horizontal distances. These must be respectively equal to the effective length of each corresponding section, or rather portions of the canal they represent, so that the total horizontal axis of the profile will be equal to the total length of the line of canal. The perpendicular lines, or ordinates to that axis, showing the altitudes above or the depression below the level of Lake Erie, should be on a scale of fifty feet to one inch. There should be at least one ordinate for each eighth of mile.

The maps and profiles should exhibit the altitude of the head and of the foot of each fall and rapids in the streams.

This line of canal should be divided into miles, and these into portions of one eighth of mile, in order to show for each of them the nature of the ground, and the average of cutting and embankment. These subdivisions of the line of canal should be given both on the horizontal axis of the profile, and on the map. On the plan and profile the bottom line of canal should be considered as the line of canal.

A descriptive memoir, referring to the maps and profiles, should be joined with a view to explain all matters of facts, and all local circumstances respecting the project of the canal.

A book of levelling should also be kept in the most intelligible order.

To avoid the necessity of applying a correction to the apparent level, the sights backward and forward should be as equal as possible.

The memoir should enter into minute details as to the location of dams, aqueducts, locks, guard-locks, walls, bridges, culverts, &c.; the nature of the bottom on which these works are to be built; the quality and places of the best materials to be used in their construction; the nature of the ground through which the canal must pass; the names of the owners of the land, and the extent of their property occupied by the canal, should be ascertained as accurately as practicable. The memoir should also mention the elevation of freshets in the rivers, especially at the head and foot of the falls and rapids.

PHILADELPHIA, *March 5, 1827.*

DEAR SIR: As you may have demands for money for the messengers, I will remark that Berdle has been paid by me up to the 18th December; rate \$19 per month. Allowed to live in the building and use fuel from the common stock.

Kurtz has been paid up to the 18th day of January. Allowed rate of \$19 per month, and rate of \$6 per month for fuel and quarters.

Yours,

J. J. ABERT.

My best respects to Lieutenant Colonel Long.

Lieutenant Colonel J. KEARNEY,
Georgetown, D. C.

21st CONGRESS—1st SESSION.

HOUSE OF REPRESENTATIVES,
December 22, 1830.

Resolved, That the Secretary of War be directed to report to this House a copy of the survey and estimate made for a canal by a corps of engineers of the United States, from Portage summit to intersect the line surveyed by Col. Kearney.

Attest:

M. ST. CLAIR CLARKE,
Clerk House of Representatives.

HOUSE OF REPRESENTATIVES,
January 26, 1830.

Resolved, That the Secretary of War be directed to return to this House, as soon as practicable, copies of the different surveys made by Colonel Kearney from the Ohio river, in a direction to Lake Erie, with a view to the improvement of the navigation in that direction, and the extension of the Chesapeake and Ohio Canal.

Attest :

M. ST. CLAIR CLARKE,
Clerk House of Representatives.

HOUSE OF REPRESENTATIVES,
January 20, 1830.

Resolved, That the Secretary of War be directed to report to this House a copy of the survey and estimate made for a canal by the corps of engineers of the United States from Portage summit to intersect the line surveyed by Colonel Kearney.

Attest :

M. ST. CLAIR CLARKE,
Clerk House of Representatives.

HOUSE OF REPRESENTATIVES,
January 20, 1830.

Resolved, That the Secretary of War be requested to communicate to this House the report of the engineer employed to make a reconnaissance of a mail and military road from Uniontown, Pennsylvania, by way of Pittsburg, to Lake Erie.

Attest :

M. ST. CLAIR CLARKE,
Clerk House of Representatives.

HOUSE OF REPRESENTATIVES,
January 20, 1830.

Resolved, That the Secretary of War be directed, as soon as practicable, to return to this House a copy of the survey made of the harbor at the mouth of Elk creek, on the south shore of Lake Erie.

Attest :

M. ST. CLAIR CLARKE,
Clerk of House of Representatives.

ELLIOTT WOODBURY AND EZRA FOSTER.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ELLIOTT WOODBURY AND EZRA FOSTER vs. THE UNITED STATES.

1. The petition of the claimant.
2. United States solicitor's brief.
3. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. .] seal of said court, at Washington, this fifth day of December,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Court of Claims of the United States:

The petition of Elliott Woodbury and Ezra Foster, both of Beverly, in the county of Essex and State of Massachusetts, respectfully shows: That on and previous to the fifth day of August, one thousand eight hundred and forty-six, your petitioners were the sole owners of the brig "Casket," whereof Henry E. Woodbury, of Beverly aforesaid, was master, and that on the said day the said brig was at anchor on the high seas, to wit: off the port of Kabenda, on the western coast of Africa, and was engaged in lawful commerce and in prosecuting a lawful voyage, as after mentioned.

That the said vessel so being was, on the said day and at the said place, seized by the United States sloop-of-war "Marion," under the command of Lewis E. Simonds, a lieutenant in the United States navy, duly commissioned, and acting under due authority from

the United States, under the allegation that the said vessel was engaged in the slave trade, in violation of the laws for suppressing the same.

That the said Lewis E. Simonds, lieutenant as aforesaid, forcibly took possession of said vessel, put a prize crew on board of her, and sent her to Boston, in the State of Massachusetts, and there delivered her to the United States marshal, under the charge as aforesaid.

That thereupon a libel was filed against said vessel, in the name and on behalf of the United States, by Robert Rantoul, jr., district attorney of the United States for that district, and the condemnation of the said vessel was thereby claimed, on the allegation that she was concerned in the slave trade.

That the said libel was filed in the district court of said district on the ninth day of October, one thousand eight hundred and forty-six, and was continued to the following December term of the court, and that at said term the cause was heard upon evidence and arguments of counsel on both sides ; and the court did thereupon order, adjudge, and decree that the said vessel was innocent, that the said charge was void, that the said libel should be dismissed, and that the said brig and appurtenances should be delivered to the claimants thereof, being these petitioners.

That by reason of said seizure petitioners lost the use of said vessel from the time of seizure until December, one thousand eight hundred and forty-six, when the marshal restored her to her said master.

That at the time of seizure the said vessel was in the course of performing certain articles of agreement, contained in a certain charter party entered into by and between the said Henry A. Woodbury, master of said brig, and Don Francisco Y. Urguellez, of Rio Janeiro, in Brazil, South America, a copy of which, marked "A," and which petitioners pray may be taken as part hereof, is hereunto annexed. That in consequence of the said seizure the said Henry A. Woodbury was prevented from fulfilling his part of said agreement, and thus forfeited to the said Urguellez the sum of two thousand dollars, pursuant to its terms.

That by the terms of the said charter party the said master was to receive one thousand five hundred mill reis, equal to eight hundred and fifteen dollars United States currency, a month, for the use of said brig, commencing on the twenty-eighth day of May, one thousand eight hundred and forty-six ; but that the same became wholly lost by reason of such seizure and non-performance by the brig.

That while the said brig was in the custody of the United States officers, as aforesaid, and when she was remanded to the possession of her said master, in December, one thousand eight hundred and forty-six, divers injuries and losses had been sustained by her, through the neglect, wantonness, and misconduct of the persons in charge of her. The sails and rigging were very greatly damaged. A house on deck over the long boat, in every respect well finished and in good order, was broken and ruined, and the cabin was much injured. The stores on board, consisting of beef, pork, bread, coffee, sugar, flour, &c., and adequate to a full supply for five months from the time of seizure, were consumed. The hull of said brig was injured, and her tackle, apparel, and furniture were damaged.

That to restore the said vessel to the same order, and replace her at Kabenda, as seized, would require at least three months' time.

That these petitioners had to keep the said vessel insured during her seizure, and were also put to very considerable costs and charges in procuring evidence and counsel to repel the untrue charges aforesaid, and to vindicate their rights in the premises, and that petitioners themselves have also been greatly harassed, and put to trouble and anxiety thereby, as well as defamed in their good name and reputation among their fellow-citizens, by being subjected to the suspicion of having been guilty of the odious and illegal crime of participation in the slave trade.

That petitioners, claiming to hold the said Lewis E. Simonds personally responsible for all the foregoing losses and damages, caused him to be sued therefor, in the district court of the United States for the district of Rhode Island, on or about the twenty-fifth January, one thousand eight hundred and forty-seven; and that in the June term of the said court, in the year one thousand eight hundred and fifty, Mr. Justice Woodbury pronounced the judgment of the court, which recognized the right of petitioners to the compensation demanded, but held that the cause of action lay against the United States, and not against the defendant Simonds, who was only their officer, and executed their laws and orders, and that petitioners should seek relief in Congress, to which judgment petitioners beg to refer.

That accordingly petitioners presented their claim to the House of Representatives in the year one thousand eight hundred and fifty-two, and again in the year one thousand eight hundred and fifty-three, through the late Hon. Robert Rantoul, of Massachusetts, and the same was referred to the Committee on Claims, but that no report was made or action had upon it, so far as petitioners know, and with Mr. Rantoul's death the proceedings dropped.

That petitioners claim that the United States, as the aggressors and actors, by their officers as aforesaid, are liable to them in the premises for the following damages, which petitioners hereby claim of and from the United States, viz:

- | | |
|--|------------|
| 1. For the rate of the charter party aforesaid, from the 28th day of May, 1846, to the — day of December, same year, when vessel was delivered back to petitioners, at \$815 a month, the rate of charter party—say six months and a half..... | \$5,397 50 |
| 2. For three months further, at the same rate, the period necessary to repair the said vessel from injuries by the United States, and to replace her at point of seizure.... | 2,445 00 |
| 3. For the penalty or forfeiture, created by non-performance of the vessel's contract under the charter party... | 2,000 00 |
| 4. For injuries aforesaid to the vessel, her hull, tackle, furniture, use of provisions, &c..... | 1,000 00 |
| 5. For insurance on the said vessel during her seizure..... | 140 00 |
| 6. For costs and counsel of petitioners in the premises, this sum being actual outlay..... | 976 85 |
| 7. For interest on these payments, commencing three | |

- months after restitution of the vessel—say 15th March, 1847, until rendition of judgment of this court.....
8. For the personal damages of petitioners.....\$10,000 00
9. For expenses incurred in forwarding witnesses, and loss of time in seeking them, and attending the various proceedings in this case..... 500 00

That petitioners are the sole owners of this claim, subject to the commission of their counsel, and no other parties are interested in it; and they pray the certificate of this honorable court, in their favor against the United States, for the foregoing sums, to be reduced into an aggregate when complete by the filling in of interest, or for such other sum as may seem meet to justice and equity in the premises.

ELLIOTT WOODBURY,
EZRA FOSTER,
By PLATT & STEWART,
Their Attorneys in fact.

PLATT & STEWART,
Attorneys for Petitioners.

City and County of New York, ss :

Zephaniah Platt, of the firm of Platt & Stewart, attorneys in fact for the petitioners in this case, being duly sworn, maketh oath and saith that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

Z. PLATT.

Sworn and subscribed this 25th day of July, 1855, before me.

WASHINGTON R. NICHOLS,
Commissioner of Deeds.

IN THE COURT OF CLAIMS

ON THE PETITION OF ELLIOTT WOODBURY AND EZRA FOSTER.

Brief of the Solicitor of the United States.

This is a claim founded on the alleged illegal seizure of the brig "Casket," on the coast of Africa, by Lieutenant Simonds, commanding United States sloop-of-war "Marion."

The only question presented is, whether the government is responsible to its citizens for the illegal acts of public officers. That it is not has been decided by this court in the case of Cassius M. Clay, and by the Supreme Court in the case of Mitchell *vs.* Harmony, 13 Howard, 137, and is so laid down in Story on Agency (§§ 319, 319a, 319b, and 320.) An officer, like every agent, to bind his principal, must act within the scope of his authority, and to pronounce the act of an officer to be illegal, is to declare it to have been an act not within the scope of his authority; and upon this it depends whether he is himself personally responsible, or whether the government is responsible. Mitchell's case was one in which Harmony's trade with Chihuahua had been interrupted, and Mitchell defended the action

brought against him by Harmony, to recover damages for losses he had sustained in consequence, by contending that he was authorized by the laws of war to make the seizure. But the Supreme Court held that the facts did not authorize the seizure, and, therefore, that Mitchell was a trespasser, and bound to make good the loss. If the traffic had been in fact illegal, or if it had been a case in which private property had been taken for public use or destroyed to prevent its falling into the hands of the enemy, there would have been no personal liability on the part of Mitchell in either case, or of the United States in the first instance; because, in that case, the property was forfeited by the owner by reason of his own improper conduct. In the other cases there would have been no liability on the part of Mitchell, but then the government would have been liable; because, as he acted in official character, and within the scope of his authority, the case would have been the same as that of *Hodgson vs. Dexter*, 1 Cranch.

There have been instances, it is true, and Mitchell's case is one of them, where Congress has indemnified public officers who have been mulcted for illegal acts done by them whilst in public service. This has been done, however, not under the idea that the government was legally bound to indemnify either those who had suffered by illegal acts of its officers, or the officers who have been compelled to pay the sufferers for those acts. These acts have been passed in consideration of the special circumstances of each case, and on the production of satisfactory evidence that the officers acted in good faith, with the single object of promoting the public service, and committed the error under such circumstances as to excuse them, in a measure, for the mistake.

Under the principle asserted here, the government would be liable without regard to such considerations, and it would not devolve on the officer himself or the sufferer to show that the error was one that a man, using ordinary consideration, and acting for the public benefit alone, might have committed. The government would, in all cases, be responsible to the sufferer absolutely on the first instance, unless it could establish collusion between the officer and the claimant.

There is no difference between a claim against the United States founded upon an injury committed by an officer acting beyond his authority, and an injury committed by any other person. Everything done by the officer beyond the letter of his authority is done as much on his own responsibility as the acts of any citizen.

No judicial authority is cited for the propositions of the claimant. His counsel, however, supposes that there is some analogy between the claims allowed against foreign governments and against our own, in some instances, perhaps, by commissioners under treaties, and refers particularly to the cases of *barque Jones*, the *Hermosa*, the *Enterprise*, and others, considered by the late joint commission between the United States and Great Britain, which were claims made by the United States against England on account of injuries committed by British officers against the property of American citizens.

Responsibility from a government to an individual is not varied by the fact that the individual is a foreigner, and that the reclamation is made by the agency of the foreign government to which the indi-

vidual belongs, and which represents the rights of its citizens or subjects against foreign governments. (See Vattel, B. II, ch. VI, §§ 71, 72, 73, 74, 75) These sections speak of the duties of one government to other governments and their citizens in respect of injuries committed by individuals under its allegiance, and fix a liability on the government of the aggressor only when that government is itself in default for failing to deliver up or to punish, &c., or when it assumes and justifies the acts of its offending citizens.

Of this character were the acts referred to in the treaties in question, not that the nation who assumed the responsibility of these illegal acts meant thereby to say, in all cases, that the acts had been authorized, or to admit the principle that it was bound to other governments or individuals for the illegal acts of its citizens or officers, but only that, in the special cases provided for by treaty, it was deemed expedient to do so, just as it has been deemed expedient by Congress to indemnify certain officers, collectors, &c., for their illegal acts.

M. BLAIR.

IN THE COURT OF CLAIMS.

MAY 31, 1859.

ELLIOTT WOODBURY AND EZRA FOSTER *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the court.

The petitioners are citizens of Beverly, in the county of Essex and State of Massachusetts. They allege in their petition that, on the 5th of August, 1856, the brig Casket, belonging to them, while on the high seas, to wit, at anchor off Kabenda, on the coast of Africa, was seized by Lieutenant Simonds, commanding the United States sloop-of-war Marion, on the allegation that she was engaged in the slave trade ; that a prize crew was put on board of her, and that she was sent into the port of Boston, in the State of Massachusetts ; that she was there libelled by the United States, and her condemnation claimed on the allegation that she was engaged in the slave trade ; that upon a hearing it was decreed " that the said vessel was innocent, and that the said charge was void ; that the said libel should be dismissed, and that the said brig and appurtenances should be delivered to the claimants thereof," these petitioners.

The petition then alleges various damages consequent upon and following the seizure, according to the specification in the petition amounting to the sum of \$22,459 35.

It was contended for the petitioners that the United States were liable to them for these damages, by the law of nations or analogies drawn from it ; and by the municipal law, upon its rule, that a principal was liable for the tortious acts of his agent while acting in the course of his employment or in the line of his duty.

Admitting that the decree of the district court established the fact

that the seizure was tortious, the question raised in the case is, whether the government is liable to its own citizens for the misfeasance or positive wrong of its officers.

For such a liability by *the law of nations* no authority was adduced and none are known. Treaties made with foreign nations were referred to; but treaties are contracts, and as such are confined to their parties and terms, and they can furnish neither rule nor analogy for the case at bar.

In the law of agency and master and servant, under the municipal law, the principal is liable for the misfeasance of his agent occurring in the course of his agency, but this rule is only the application of the maxim "*Qui facit per alium facit per se*," and the rule stops with its reason; therefore in that law the principal is never liable for the *wilful* misfeasance of his agent. In such case the unlawful intent, of which the unlawful act is but the consummation, is not the principal's, but the agent's only, and he therefore is alone responsible for it. Hence the familiar instances of collisions at sea and on land. If the servant of A drive his carriage against B's carriage carelessly, A is liable; but if the servant of A drive his carriage against B's carriage wilfully, A is not liable, but his servant is alone responsible. The rule as to misfeasances or positive torts is the same for public agencies as for those of private individuals.

But in the theory of the municipal law every unlawful act of a *public officer* is held to be, by a presumption of law, founded on public policy, and therefore absolute and conclusive—the result of an original unlawful intent on the part of the officer, apart from and outside of his official authority, and belonging to him personally and exclusively, and therefore the responsibility for the act is his exclusively. The rule is thus stated by Lord Coke in the Six Carpenters' case, 8 Rep.: "Where entry authority or license is given to any one *by the law*, and he does abuse it, he will be a trespasser *ab initio*;" and he then states the reason of the rule to be, "that, in the case of a general authority or license *of the law*, the law adjudges by the subsequent act *quo animo* or to what intent he entered; for *acta exteriora indicant interiora secreta*." This has been always and uniformly the rule as to public agencies, and applied to this case it makes the seizure of the brig Casket, in legal theory, the unofficial act of Lieutenant Simonds, with which the United States had no connexion, and for which or its consequences or incidents they are not responsible.

This rigorous presumption of the ancient municipal law has been in many instances in modern law and under statutes of the United States so far mitigated, in consideration of facts, as to relieve the officer from responsibility on proof of probable cause; but that has no reference to the liability of his government, and therefore need not be considered here.

The case of *Mitchell vs. Harmony* (13 How., 115) and *Story on Agency* (s. 307) were cited as authorities for the claim of the petitioners.

But the case of *Mitchell vs. Harmony* only decides as to the personal liability of the public officer, and that he could not justify an illegal act by the order of a superior officer which was manifestly ille-

gal. No question of the liability of the government was raised in the case.

The section cited from Story on Agency, and the whole chapter from which it is cited, refers only to the liability of principals in *contracts* made by their agents, and to declarations and representations and acts not tortious in contracts, and even as to these it declares the government not liable unless it authorized the specific declaration, representation, or act effecting the injury. The section has no reference to misfeasances or torts; and that text book, in section 319, in the 12th chapter, which treats of torts, is direct and full to the point that the government is not liable for the misfeasances or tortious acts of its officers.

This case is the same in principle as that of *Cassius M. Clay vs. The United States*, heretofore decided by this court; and for the reasons given in that case and for those stated above we are of opinion that the United States are not liable in any degree for the seizure of the Casket by Lieutenant Simonds, or for any of the alleged consequences of that act, and that the petitioners are not entitled to the relief they pray for.

LYDIA FRAZEE, ADMINISTRATRIX OF JOHN FRAZEE

[To accompany Bill H. R. C. C. No. 93.]

FEBRUARY 11, 1860.—The Court of Claims submitted the following report, which, together with the accompanying bill, was referred to the Committee of Claims.

MARCH 1, 1860.—Ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

LYDIA FRAZEE, ADMINISTRATRIX OF JOHN FRAZEE.

vs.

THE UNITED STATES.

1. The petition of the claimant.
2. Documentary evidence and depositions filed by claimant, transmitted to the House of Representatives.
3. Certified copies of letters from the Treasury Department, furnished by the Solicitor, transmitted to the House of Representatives.
4. Claimant's brief.
5. United States solicitor's brief.
6. Opinion of the court.
7. Bill allowing claimant \$2,868, ordered to be reported to Congress.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said court, at Washington, this fifth day of December,
A. D. 1859.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

LYDIA FRAZEE, *vs.* THE UNITED STATES.*To the honorable Judges of the Court of Claims:*

The petition of Lydia Frazee, of the city of New York, widow and administratrix of John Frazee, late of said city, deceased, respectfully represents: That on the 22d day of July, 1855, with the approbation of the Treasury Department, the said John Frazee was appointed architect and superintendent of the New York custom-house, at a salary of seven dollars per day; his travelling expenses on the business of his office to be paid, and an assistant, or draughtsman, was allowed him, at three dollars per day.

That when he was thus appointed the massive foundations of the custom-house had been laid, and raised even with the ground, and marble had been already wrought and finished at the quarries, some twenty miles from the city, under the direction of the former superintendent, and in accordance with plans which he had furnished, amounting in value to more than fifty thousand dollars. These plans and drawings had, however, upon the resignation in May previous of that superintendent, been taken away by him, and he refused upon application to surrender them, and they never have been surrendered. This great and unexpected difficulty was, however, overcome; the stone already wrought was rendered available, and all the various artizans engaged in the work were fully and successfully employed.

In May, 1837, the labors of the said John Frazee having been greatly increased by the resignation of his assistant, the commissioners decided, with the approbation of the Secretary of the Treasury, to increase his pay to nine dollars per day, but to withhold at the same time the allowance for his travelling expenses. These expenses were unavoidable. Not a stone was laid in the building but in precise conformity with a plan previously furnished; supervision of the work at the quarries was therefore indispensable, and visits were made to the quarries once or twice a week, at the cost of four and five dollars each visit, during the whole period of quarrying the stone. This additional compensation of the said John Frazee was further affected by the sums he found it indispensable to pay from time to time for the aid of assistant draughtsmen in the progress of the work.

Under this contract for the compensation of the said John Frazee the erection of the building went on, and nothing occurred to affect it or lessen its binding force until the autumn of 1840, when a difference arose between Walter Bowne, esq., one of the commissioners, and the said John Frazee, concerning the manner and style of finishing the interior, and the furniture for the building. So much at variance with architectural propriety and good taste, in the opinion of the said John Frazee, were the views and plans of Mr. Bowne, that their adoption would have compromised the professional character of the architect; the said John Frazee, therefore, did most strenuously oppose them, and was sustained in his opposition to them by the opinion of the then collector and advisory commissioner, Mr. Hoyt;

the result of which was the delivery to the said John Frazee of a paper. of which the following is a copy :

“ *Resolved*, That the services of the superintendent and architect be dispensed with from and after the 5th December, 1840, and that his pay cease from that date.

“ WALTER BOWNE,

“ *Commissioner and agent, New York.*

“ NEW CUSTOM-HOUSE,

“ *November 30, 1840.*”

It was usual for resolutions relating to the affairs of the building to receive the signature and approval of the advisory commissioner ; but both were in this instance withheld by Mr. Hoyt, who considered the course of Mr. Bowne unwarrantable and without excuse, and who remonstrated against the dismissal of the said John Frazee for a mere difference of opinion with Mr. Bowne, while so much important work, requiring constant supervision of the architect, remained to be done.

The whole matter was submitted to the Secretary of the Treasury, who referred it to the naval officer and surveyor of the customs at New York. On the 26th February, 1841, Mr. Coe, deputy naval officer, (in the absence of his principal,) and Mr. Moore, surveyor, reported their opinions upon the matters in controversy, fully sustaining all the views of the said John Frazee, and, amongst other things, said :

“ We would most respectfully beg leave to state it here, as our deliberate opinion, that justice cannot be done to Mr. Frazee without allowing him his usual compensation during the whole interval since his dismissal on the 5th December, 1840, he having been improperly dismissed, without cause,” &c.

Upon this report, and in conformity with its opinion, the Secretary, on the 3d March, 1841, directed that the said John Frazee should be “ continued ” in the situation of architect and superintendent until the completion of the building, and that his plans and designs for finishing the interior and for the furniture should be carried into effect.

Believing, as the said John Frazee did, that Mr. Bowne’s resolution of dismissal above referred to would not be sanctioned by the Secretary, the said John Frazee continued, by the advice and at the request of Mr. Hoyt, to attend daily, as usual, at the building, and to advise the workmen employed there, until he received the Secretary’s letter continuing his services, as already mentioned, and by virtue of which he resumed the full discharge of his duties as superintendent and architect.

On the 23d March, 1841, Mr. Curtis succeeded to the collectorship of the port of New York ; and, under the administration of Mr. Curtis, the said John Frazee proceeded in the superintendence of the work upon the custom-house, and the completion thereof, and the construction of the requisite furniture, devoting his whole time and attention thereto, with the full approbation and concurrence of the collector and the Treasury Department, until the 21st of May, 1842, when the work was finished ; and during that period, as well as before, he made,

at the request of the collector and of the other government officers in charge of the work, various journeys to Washington, at his own expense, to explain the progress of the work and the amount and character of the appropriations required, so as to obtain such appropriations from Congress ; which expenses he charged to the government, and expected to receive when his account for services and disbursements was finally settled.

And the petitioner further shows that the services rendered by the said John Frazee, as herein stated, were arduous and difficult, requiring his whole time and attention, and a high degree of professional skill ; that his said duties were discharged with eminent fidelity and success, and to the entire approbation of the government, of which the structure itself on which his labors were expended affords the highest and most satisfactory evidence ; and that, in the discharge of these duties, and in consequence of the exposure incident thereto, he contracted a severe disease, from which, after long suffering, he died.

And the petitioner further represents that at the completion of the custom-house further appropriations were needed to pay the amount due said John Frazee, and other similar claims arising out of the work ; that the matter was brought before Congress, and said John Frazee attended at Washington several times, at very considerable expenditure of time and money, to endeavor to procure the payment due him ; that after many delays a clause was inserted in the general appropriation bill passed by Congress in the year 1843, providing for his payment, which, having passed the Senate upon report of their Finance Committee, was rejected, among many other clauses, in the House, though approved by the Committee of Ways and Means ; and, upon the Senate adhering, was referred to a committee of conference, and finally stricken out, from the necessity of a compromise which would insure the passage of the bill.

That afterwards the said Frazee continued from time to time, as far as his limited means would allow, to press his claim for payment upon Congress, there being no appropriation out of which the same could be paid at the treasury. But, although the validity of his claim was always acknowledged by the department, and no adverse action was had thereon in Congress, he never succeeded in obtaining any favorable action. The petitioner is now unable to state, if it were material, the precise history of these various efforts, but finds no record of congressional action in the premises, except that in the first session of the thirtieth Congress a memorial and accompanying documents was presented in behalf of the said Frazee in the House of Representatives, praying payment of his said claim, and was referred to the Committee of Claims ; and that no further action thereon appears from the records, or was had, so far as the petitioner knows or is informed. And the petitioner states that since the death of her husband, which occurred on the 26th of February, 1852, she has been in very limited circumstances, and wholly unable hitherto to press said claim upon the attention of Congress, even had she been advised that in the existing condition of that department of the public business, prior to the establishment of this court, there would have been any reasonable prospect of obtaining the action of Congress thereon.

And the petitioner further states that there is justly due to the estate of the said John Frazee from the government of the United States, for the services and labor and disbursements above described, and upon contract of the government to pay for the same, the sum of thirty-seven hundred and fifty dollars and thirty-nine cents, with interest thereon from the 21st day of May, 1842, being for four hundred and fifty-six days' services and expenses, at nine dollars per day, and two hundred and seven dollars and thirty-nine cents expenses incurred in the journeys to Washington, made, as aforesaid, during the progress of the work, after deducting the sum of five hundred and sixty-one dollars received on account; and that of the above balance no part has ever been paid.

And the petitioner further shows to the court that on the 10th day of January, 1856, she was duly appointed, by the surrogate of the county of New York, administratrix of said John Frazee, and therefore claims that there is justly and legally due her, as such administratrix, from the government of the United States, upon the contract aforesaid, the aforementioned sum, with the interest thereon, and prays that the same may be allowed her by the court, and a bill reported for the payment thereof, as required by law.

Dated at New York, this 10th day of January, 1856.

JOHN J. LATTING,

Counsel for Claimant.

STATE OF NEW YORK, }
City and County of New York, } ss:

Lydia Frazee, of said city the claimant above named, being duly sworn, says: That the facts stated in the foregoing petition are true to the best of her knowledge and belief.

LYDIA FRAZEE.

Sworn this 10th day of January, A. D. 1856, before me,

CHARLES A. MAY,

Commissioner for the Court of Claims, N. Y.

No. 9.

The people of the State of New York to Lydia Frazee, of the city of New York, the widow of John Frazee, deceased, send greeting:

Whereas the said John Frazee lately departed this life intestate, being at or immediately previous to his death an inhabitant of the county of New York, by means whereof the ordering and granting administration of all and singular the goods, chattels, and credits whereof the said intestate died possessed in the State of New York, and also the auditing, allowing, and final discharging the account thereof, doth appertain unto us, and we being desirous that the goods, chattels, and credits of the said intestate may be well and faithfully

administered, applied, and disposed of, do grant unto you, the said Lydia Frazee, full power, by these presents, to administer and faithfully dispose of all and singular the said goods, chattels, and credits; to ask, demand, recover, and receive the debts which unto the said intestate, whilst living, and at the time of his death, did belong; and to pay the debts which the said intestate did owe, as far as such goods, chattels, and credits will thereunto extend and the law requires, hereby requiring you to make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said intestate, within a reasonable time, and return a duplicate thereof to our surrogate of the county of New York, within three months from the date of these presents; and if further personal property or assets of any kind not mentioned in any inventory that shall have been so made shall come to your possession or knowledge, to make, or cause to be made, in like manner, a true and perfect inventory thereof, and return the same within two months after discovery thereof; and also to render a just and true account of administration when thereunto required; and we do, by these presents, depute, constitute, and appoint you, the said Lydia Frazee, administratrix of all and singular the goods, chattels, and credits of the said John Frazee, deceased.

In testimony whereof, we have caused the seal of office of the surrogate of said county to be hereunto affixed. Witness Alexander W. Bradford, surrogate of said county, at the city of New York, the tenth day of January, in the year of our Lord one thousand eight hundred and fifty-six, and of our independence the eightieth.

A. W. BRADFORD,
Surrogate.

No. 10.

United States to John Frazee, Dr.

To services rendered as architect and superintendent of the building of the New York custom-house, from the 5th day of December, 1840, up to the 21st day of May, 1842, 456 days, at \$9 per day.....	\$4,104 00
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To my expenses in travelling twice to Washington, and boarding there, in the months of April, May and June, 1842, for the purpose of obtaining an appropriation to pay off the arrearages due for labor and materials in the finishing of the building.....	207 39
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4,311 39

Cr.

By sundry articles made for me at the building, amounting to	\$39 00
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By cash on account.....	522 00
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561 00

3, 750 39

No. 1.—A.

OFFICE OF THE COMMISSIONER FOR BUILDING CUSTOM-HOUSE,
New York, May 19, 1837.

SIR: Your letter of 29th ultimo was duly received. The commissioners, in consideration of the close application and arduous duties required of Mr. Frazee in his situation of superintendent and architect, do therefore recommend it to the department to allow Mr. Frazee two dollars per day in addition to the seven dollars now allowed him. The commissioners take pleasure in stating that they have entire confidence in the talents and ability of Mr. Frazee in carrying forward the building to its completion, and to the full satisfaction of the government.

It is understood that, should Mr. Frazee require aid to draw or copy plans or specifications no charge is to be made, nor for expenses visiting the quarry or other places where persons are at work for the new custom-house building.

Most respectfully, your obedient servants,
WALTER BOWNE,
DANIEL JACKSON,
BENJAMIN RINGGOLD,
Commissioners.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

Approved by the commissioners.

W. L., *Secretary.*

Endorsed: This I will admit if correctly copied.

M. B.

No. 2.—B.

TREASURY DEPARTMENT, May 24, 1837.

GENTLEMEN: In consequence of the recommendations contained in your letter of the 19th instant, in reference to the application of Mr. John Frazee to be allowed an increase of two dollars per day to his present compensation as architect and superintendent to the new custom-house building, and with the understanding that he is also to discharge the duties assigned to a clerk heretofore allowed him, the proposed increase is authorized.

I am, very respectfully, your obedient servant,
LEVI WOODBURY,
Secretary of the Treasury.

Messrs. WALTER BOWNE,
DANIEL JACKSON,
BENJAMIN RINGGOLD,
Commissioners, &c., New York.

Endorsed: This I will admit if correctly copied.

M. B.

No. 3.

TREASURY DEPARTMENT, *March 3, 1841.*

SIR: The department having called upon the deputy naval officer at New York to report their joint views in regard to the difference of opinion existing between yourself and Mr. Hoyt respecting certain matters connected with the new custom-house building, they have accordingly complied with my request.

In accordance with their recommendations, I deem it proper to authorize Mr. John Frazee to be continued in the situation of superintendent and architect of the building, until the custom-house and the furnishing of the respective rooms shall have been completed. And it is desirable that Mr. Frazee's plans for the interior arrangements of the building should be carried into effect, so far as regards the arrangement of the fly-doors, furniture, and painting of the iron work.

I am, &c., &c.,

LEVI WOODBURY,
Secretary of the Treasury.

WALTER BOWNE, Esq.,
Commissioner, New York.

Endorsed: This may be read in evidence.

M. B., *Solicitor.*

No. 4.

TREASURY DEPARTMENT, *March 3, 1841.*

SIR: For your information, I transmit herewith a copy of my communication of this date to Walter Bowne, esq., commissioner, &c., respecting yourself and other matters connected with the new custom-house building.

I am, very respectfully, your obedient servant,

LEVI WOODBURY,
Secretary of the Treasury.

JOHN FRAZEE, Esq.,
Superintendent and Architect, &c., New York.

Endorsed: I admit this in evidence.

M. BLAIR, *Solicitor.*

No. 5.

Mr. Curtis' statement.

COLLECTOR'S OFFICE, *New York, March 7, 1844.*

I have read Mr. Frazee's memorial. To the best of my recollection he has truly stated the conversation which passed between him and

myself when I entered upon the duties of the office of collector in March, 1841.

I was not a commissioner for the superintendence of the construction of the new custom-house, and neither had nor professed to have any power or responsibility in respect to its construction, nor in regard to the terms or compensation of Mr. Frazee as its architect. His commission was from the Department of the Treasury, and I mentioned in one of my letters to Mr. Ewing what had been paid by Mr. Frazee, but I received no authority to make any new arrangement touching his terms or his compensation, and no notice was taken by the department of what I communicated.

In the spring of 1842 Mr. Frazee frequently spoke to me of the trouble that existed from the want of means to pay the workmen employed on the building and others who had claims for materials furnished. There was no acting commissioner. On several former occasions, in previous years, the work on the building had been ahead of the appropriations, and the commissioner had sent Mr. F. to Washington to make the necessary explanations and aid in obtaining the requisite appropriations. I advised him to go to Washington, as he had been on former occasions, and explain to the department and Congress the state of the accounts, show what and how much was due, and, by application to the Department of the Treasury and to Congress, to do what he could to obtain the means to pay off the arrears to laborers and others having just claims. In accordance with this advice, Mr. F. went to Washington in May or June, 1842.

I believe Mr. Frazee's claim to be just. After seven years' superintendence of the great work committed to his charge, Mr. F. has come out of it a very poor man. I know he has been skilful, and have every reason to believe he has been faithful to the government.

He is likely to be a cripple for life from disease contracted by exposure of his health while in the discharge of his duty.

I hope he will receive the compensation to which he is entitled.

Endorsed: This may be admitted in evidence.

M. B.

NEW YORK, *March 6, 1844.*

SIR: I received your letter of the 1st instant, in regard to your connexion, as architect and superintendent, with the new custom-house in this city, and you put to me three inquiries in reference thereto, to which I have to say:

1st. I was associated with Walter Bowne, esq., in its general superintendence from March 29, 1838, to March 2, 1841, and I recollect that we differed in opinion in reference to several matters connected with the subject, and among other things I objected to your dismissal as architect in the fall of 1840, or at least I did not approve of that measure. I think I wrote the Secretary of the Treasury on the subject at the time of it, and if so, a copy of the letter, no doubt, will be found on file in the custom-house, and the collector, at your

request, would permit you to take a copy for any proper purpose you may have in view.

2d. I wrote to the Secretary under the idea that he would interfere in a matter about which there was a difference of opinion between Mr. Bowne and myself, and therefore I recommended that you should remain at the building and see that nothing was done inconsistent with the general plan which had been adopted for its construction, until the Secretary should decide upon the points upon which Mr. Bowne and myself differed, and you adopted my advice and did remain until the Secretary did order you to be continued, which I considered at the time as a decision on his part that you had not been dismissed according to the appropriate forms.

3d. In regard to your visits to Washington on business relating to the new custom-house, to explain in reference to appropriations asked for, I know that you did so visit Washington, and I am under the impression it was at the suggestion of the Secretary, but certainly at the request of the commissioners of the custom-house, and I have no doubt your expenses were paid and charged to construction, as I think it was a fair charge. The appropriations were large and more than was originally contemplated, and it was very proper to ask for and equally proper to explain the causes for the excess, which was next to impossible to explain by letter.

I believe I have in substance answered your inquiries and according to my best recollections on the subject. As you are aware, I was not able, from my constant official avocations, to devote much time to the superintendence of the new building. I had nothing to do with the disbursements of the money therefor or with keeping of the accounts. This was wholly under the responsibility of Mr. Bowne.

Very respectfully,

J. HOYT.

JOHN FRAZEE, Esq.,
New York.

To the Senate and House of Representatives of the United States of America in Congress assembled :

The memorial of John Frazee, of the city of New York, late architect and superintendent of the custom-house recently erected in that city, respectfully represents :

That on the 22d day of July, 1835, with the approbation of the Treasury Department, your memorialist was appointed architect and superintendent of the New York custom-house, at a salary of seven dollars per day, his travelling expenses on the business of his office to be paid, and an assistant, or draughtsman, was allowed him, at three dollars per day :

That when he was thus appointed the massive foundations of the building had been laid and reared even with the ground, and marble had been already wrought and finished at the quarries, some twenty miles from the city, under the direction of the former superintendent, and in accordance with plans which he had furnished, amounting in

value to more than fifty thousand dollars. These plans and drawings had, however, upon the resignation in May previous of that superintendent, been taken away by him, and he refused, upon application, to surrender them, and they never have been surrendered. This great and wholly unexpected difficulty was, however, overcome. The building was remodelled; plans, drawings, and specifications were furnished; the stone already wrought was rendered available; and all the various artizans engaged in the work were fully and successfully employed. In May, 1837, the labors of your memorialist having been greatly increased by the resignation of his assistant, the commissioners decided, with the approbation of the Secretary of the Treasury, to increase his pay to nine dollars per day, but to withhold, at the same time, the allowance for his travelling expenses. These expenses were unavoidable. Not a stone was laid in the building but in precise conformity with a plan previously furnished. Supervision of the work at the quarries was therefore indispensable, and visits were made to the quarries once or twice a week, at the cost of four and five dollars each visit, during the whole period of quarrying the stone. This additional compensation of your memorialist was further affected by the sums he found it indispensable to pay from time to time for the aid of assistant draughtsmen in the progress of the work.

Under this contract for the compensation of your memorialist the erection of the building went on, and nothing occurred to affect it or lessen its binding force until the autumn of 1840, when a difference arose between Walter Bowne, esq., one of the commissioners, and your memorialist, concerning the manner and style of finishing the interior and the furniture for the building. So much at variance with architectural propriety and good taste, in the opinion of your memorialist, were the views and plans of Mr. Bowne, that their adoption would have compromised the professional character of the architect. Your memorialist, therefore, did most strenuously oppose, and was sustained in his opposition to them by the opinion of the then collector and advisory commissioner, Mr. Hoyt, the result of which was the delivery to your memorialist of a paper, of which the following is a copy:

“NEW CUSTOM-HOUSE, November 30, 1840.

“*Resolved*, That the services of the superintendent and architect be dispensed with from and after the 5th December, 1840, and that his pay cease from that date.

“WALTER BOWNE,

“*Commissioner and Agent, New York.*”

It was usual for resolutions relating to the affairs of the building to receive the signature and approval of the advisory commissioner, but both were in this instance withheld by Mr. Hoyt, who considered the course of Mr. Bowne unwarrantable and without excuse, and who remonstrated against the dismissal of your memorialist for a mere difference of opinion with Mr. Bowne while so much important work, requiring constant supervision of the architect, remained to be done.

The whole matter was submitted to the Secretary of the Treasury,

who referred it to the naval officer and surveyor of the customs at New York. On the 26th February, 1841, Mr. Coe, deputy naval officer, (in the absence of his principal,) and Mr. Moore, surveyor, reported their opinions upon the matters in controversy, fully sustaining all the views of your memorialist, and, amongst other things, said :

“ We would most respectfully beg leave to state it here, as our deliberate opinion, that justice cannot be done to Mr. Frazee without allowing him his usual compensation during the whole interval since his dismissal on the 5th December, 1840, he having been improperly dismissed, without cause,” &c.

Upon this report, and in conformity with its opinions, the Secretary, on the 3d March, 1841, directed that your memorialist should be “ CONTINUED ” in the situation of architect and superintendent until the completion of the building, and that his plans and designs for finishing the interior and for the furniture should be carried into effect.

Believing, as your memorialist did, that Mr. Bowne’s resolution of dismissal above referred to would not be sanctioned by the Secretary, your memorialist continued, by the advice and at the request of Mr. Hoyt, to attend daily, as usual, at the building, and to advise the workmen employed there until he received the Secretary’s letter *continuing* his services, as already mentioned, and by virtue of which he resumed the full discharge of his duties as superintendent and architect.

On the 23d March, 1841, Mr. Curtis succeeded to the collectorship of the port of New York, and soon after requested an interview with your memorialist ; it took place, and then, and subsequently, the collector expressed a strong desire to hasten the completion of the building and fit it for occupancy with the least delay ; the buildings then occupied as the custom-house were not only inconvenient but insecure, and the public records were not safe there. Your memorialist was asked when the new building could be completed and furnished, and if it could not be rendered habitable by August then next ; and, also if he could not consent to lessen his compensation for the few intervening months. In reply, a strong doubt was expressed of the possibility of finishing and furnishing the building by August ; and as to compensation, your memorialist, among other things, alluded to the suspension of his pay in consequence of the course pursued by Mr. Bowne, and said and consented, in case he received his back pay, to render his services gratuitously until the completion of the building *as fixed* by the collector. This, in truth, was the *spirit*, if not the letter, of his consent to serve gratuitously, but the contingency upon which this consent rested never happened ; the building was not finished in August, 1841, nor has your memorialist to this hour received his back pay ; besides, your memorialist has reason to believe that the collector soon after communicated to the Treasury Department this consent to serve gratuitously, and that no instructions on the subject have ever been given, nor has the receipt of it even been acknowledged by the Secretary of the Treasury.

Soon after the interview already mentioned the collector, in compliance with instructions from the treasury, contracted with a cabinet-

maker of this city for the furniture for the building, which, by the terms of the contract, was to be made after the designs and under the supervision of your memorialist. Of this furniture enough was finished on the 22d day of February, 1842, to enable the collector to occupy it as a custom-house; and on the 21st May, 1842, the state of the entire building and furniture was such as to allow and justify your memorialist in discharging the men employed and in bringing his anxious and responsible labors to a close, continued as they daily and exclusively had been from the day of his appointment, in July, 1835, through a period of six years and ten months.

For his services thus rendered your memorialist claims, agreeably to his account stated and hereto annexed, the sum of three thousand seven hundred and fifty dollars and thirty-nine cents as the balance now due him under his contract.

It has not been the purpose of your memorialist to attempt a history of the construction of the edifice, or of all of the many serious and perplexing difficulties which had to be surmounted in its progress; of these, however, none were more annoying than the occasional failures of Congress to make the usual annual and necessary appropriations. This, from time to time, rendered it expedient for your memorialist, in the opinion of the commissioners, to go to Washington to make the requisite explanations to the department and to the committees of Congress, and the expenses of such journeys were allowed and paid him. At the completion of the building various bills for labor, services, and materials, including his own, were due, and an appropriation was necessary for their payment, to aid in obtaining which your memorialist, by the advice of the collector, went to Washington, and his expenses for that journey form part of the balance which he claims.

An attempt had been made by one of the commissioners appointed to investigate the affairs of the New York custom-house to impugn the integrity of some of the contracts, and of the parties to them, for finishing and furnishing the building, which, with other circumstances, conspired to produce the reference of the whole subject of appropriations for that building to a select committee of the House of Representatives. That committee allowed to your memorialist a sum, which he received and has credited on his account herewith. Their report is a matter of record, and it is not alluded to now with the view of discussing its merits, or exposing its many fallacies, its unwarrantable inferences, or its false conclusions, for your memorialist well knows that his claim rests and will be determined upon its own merits, and not upon merits or demerits of that report; but he does allude to that report to say that the attempt made by it to fasten the infamous charge of forgery upon him was most signally defeated, as has been also a subsequent similar attempt to produce his removal, on the same charge, from a subordinate office in the customs, (which his necessities compelled him to ask and to accept,) as will appear by the documents hereto annexed.

Your memorialist has thus endeavored to present all the material facts relating to or affecting the contract under which his services have been rendered to the government, and by which a structure has been reared second to none on this continent, and calculated to endure for

ages. When he first entered upon the duties of his appointment he was much embarrassed ; the payment of those debts and the maintenance and education of a large family, of twelve in number, have absorbed all of his salary but this small remnant of it. The untimely occupancy of a room in the building as his office, and exposure to its damps, has subjected him to disease, and he has reason to fear will render him infirm for the remainder of his days. This balance is all that remains to him of the anxious labors and untiring efforts of nearly seven years of his life. Does not his contract entitle him to demand it? Can Congress longer in justice withhold or delay the payment of it?
JOHN FRAZEE.

NEW YORK, *March* 14, 1844.

CITY AND COUNTY OF NEW YORK, ss :

John Frazee, of the city of New York, architect and sculptor, being duly sworn, deposes and says that all the facts and statements in the above memorial to Congress, unto which his name is subscribed, are, to the best of his knowledge and belief, most faithfully and substantially true and correct.

JOHN FRAZEE.

CITY AND COUNTY OF NEW YORK, ss :

I, Robert H. Morris, mayor of the city of New York, do hereby certify that on the 15th day of March, 1844, before me, personally appeared John Frazee, of this city, sculptor and architect, and made oath to the above affidavit by him thereunto subscribed.

Witness my hand and seal this 15th day of March, 1844.

[L. s.]

ROBERT H. MORRIS, *Mayor*.

List of documents accompanying this memorial.

Copy of letter from commissioners to the Secretary, relative to increase of pay of memorialist, dated May 19, 1837, marked A.

Copy of Secretary's letter to commissioner, approving of increase of pay, dated May 24, 1837, marked B.

Copy of deputy naval officer and surveyor's report to Secretary on the Bowne controversy, dated February 26, 1841, marked C.

Copy of Secretary's letter to Walter Bowne, dated March 3, 1841, marked D.

Copy of John Frazee's letter to Jesse Hoyt, late collector, dated March 1, 1844, and Mr. Hoyt's answer, dated March 6, marked E F.

Copy of Collector Curtis' letter to John Frazee, dated March 7, 1844, marked G.

John Frazee's account stated, balance \$3,750, marked H.

Printed pamphlet, entitled "Refutation of charges against John Frazee," marked I.

George F. Talman, successor to Walter Bowne, commissioner or disbursing agent, dated March, 1844, marked J.

Copy of McW. Francis', M. D., letter, dated March 8, 1844, marked K.

Transmitted by mail March 15, 1844. Directed to Hon. Silas Wright, U. S. Senate, Washington.

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT,
February 2, 1859.

Pursuant to the act of Congress of February 22, 1849, I hereby certify that the annexed are true copies from the records and files of this department.

In witness whereof I have hereunto set my hand and caused the
[L. s.] seal of the Treasury Department to be affixed on the day and
year first above written.

HOWELL COBB,
*Secretary of the Treasury.*CUSTOM-HOUSE, NEW YORK,
Februarg 26, 1841.

SIR : In compliance with the request expressed in your letter of 22d instant, the undersigned have duly investigated the matter in controversy between Walter Bowne and Jesse Hoyt, esqrs., touching the completion of the new custom-house, the manner of finishing certain portions of the work, and also the discharge of Mr. Frazee, the architect and superintendent of the building. We beg leave to submit the following views and statements as the result of our investigations :

1st. As relates to the building being finished, we have been satisfactorily informed that stone-cutters, masons, carpenters, painters, iron-workers, and laborers have been constantly at work upon the building during the present winter. We find also that workmen in most of these several branches are still engaged upon the building, and that there is more or less work to be done in the several branches above enumerated before the building can be considered *as finished*.

2d. As relates to the dismissal of the architect and superintendent, Mr. Frazee, it is our most deliberate opinion and judgment that the superintendent of so important a structure as the new custom-house is the last person that should be discharged from the work ; for we hold that his supervision over every part of the work is necessary to the well finishing of the edifice, and also to insure public confidence in its perfect completion.

The pay-list of the workmen, as we have seen, shows that at the time Mr. Frazee was dismissed, December 5, 1840, there were upwards of thirty workmen engaged upon the building, and that nearly the same number were continued upon the work for several weeks afterwards, and, as has already been stated, a number of workmen are still employed upon the building. Thus it appears that during a period of nearly two months this important edifice has been progressing towards completion without the superintendence of any person properly qualified to direct the workmen in the various and difficult branches in which they were engaged. In view of these facts and considerations, we feel constrained to regard the resolution of Mr. Bowne, dis-

missing the architect and superintendent without cause or provocation, as an act of gross injustice to one of the first artists of the age, as well as detrimental to the public interests. And as there appears to be much work still to be done upon the building which requires the professional skill and superintending services of Mr. Frazee, we would recommend that he be immediately reinstated. We would also most respectfully beg leave to state it here as our deliberate opinion that justice cannot be done Mr. Frazee without allowing him his usual compensation, covering the whole interval of time since his dismissal on the 5th of December, 1840, he having been improperly dismissed, without cause, and thereby unexpectedly thrown out of employment, greatly prejudicial to his interests.

3d. With regard to the fly-doors constructed under the direction of Mr. Bowne at the two entrances, we would state that we fully concur in opinion with Mr. Hoyt and Mr. Frazee, that the constructing of the wooden doors outside of the iron ones greatly impairs the beauty and harmony of the architecture at these entrances; besides, they are so ill-constructed as entirely to defeat the objects for which they were designed. We would therefore recommend that they be taken down and the proper casements and fly-doors be constructed by the direction and under the superintendence of Mr. Frazee.

4th. With respect to the finish to be put upon the iron work, we would remark that in our opinion there is no other way of giving to it a finish in suitable keeping with the other parts of the building but that of bronzing, and such is the general opinion expressed here by all those whose attention has been called to the subject. And as to the most suitable time for putting on the bronze finish, as well as the manner and style of its execution, it should, we conceive, be left entirely to the judgment of the architect.

5th. In reference to the furniture, we would state that as the counters which are already put up in several of the rooms, however objectionable they may be, are only intended for temporary use until suitable furniture can be made, we forbear making any particular remarks on this part of the subject; we would observe, however, that the design and planning of the new furniture, agreeably to the economy and arrangements which may be suggested by the officers of the various departments, are things which should, in our judgment, command the taste, skill, and superintendence of the architect of the edifice; and that he also be permitted to select the mechanics who are to execute and put up this kind of work.

The foregoing are the conclusions at which we have arrived after due investigation and reflection. All of which is respectfully submitted.

With great respect, your obedient servant,

GEORGE W. COE,
Deputy Naval Officer.
ELY MOORE, JR.,
Surveyor.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

TREASURY DEPARTMENT, *March 3, 1841.*

SIR: For your information I transmit herewith a copy of my communication of this date to Walter Bowne, esq., commissioner, &c., respecting yourself and other matters connected with the new custom-house building.

I am, &c.,

LEVI WOODBURY,
Secretary of the Treasury.

JOHN FRAZEE, Esq.,
Superintendent and Architect, &c., New York.

TREASURY DEPARTMENT, *March 3, 1841.*

SIR: The department having called upon the deputy naval officer and surveyor at New York to report their joint views in regard to the difference of opinion existing between yourself and Mr. Hoyt respecting certain matters connected with the new custom-house building, they have accordingly complied with my request.

In accordance with their recommendation, I deem it proper to authorize Mr. John Frazee to be continued in the situation of superintendent and architect of the building from the date of the passage of the general appropriation bill until the custom-house and the furnishing of the respective rooms shall have been completed; and it is desirable that Mr. Frazee's plans for the interior arrangements of the building should be carried into effect so far as regards the arrangement of the fly-doors, furniture, and painting of the iron work.

I am, &c.,

LEVI WOODBURY,
Secretary of the Treasury.

WALTER BOWNE, Esq.,
Commissioner, &c., New York.

UNITED STATES COURT OF CLAIMS.

LYDIA FRAZEE *vs.* THE UNITED STATES.

Depositions of witnesses produced, sworn, and examined in the above entitled cause on the part of the petitioner.

DECEMBER 6, 1856.

The petitioner appears, by E. J. Phelps, esq., her counsel—no one appearing on behalf of the government.

Stephen C. Duryea, being sworn and examined on the part of the petitioner, deposes and says as follows:

My name is Stephen C. Duryea; I am employed in the county clerk's office of the city of New York; I am in my forty-third year; I have resided in New York all my life; I have no interest, direct or

indirect, in the claim which is the subject of inquiry in above action ; and I am distantly related to the petitioner ; the claimant's father and my father were half brothers.

Question. Were you acquainted with John Frazee in his lifetime, and how long ?

Answer. I was acquainted with him during the twelve years preceding his death.

Question. What was his profession ?

Answer. He was a sculptor and architect.

Question. What, in your judgment, were his qualifications and standing in that profession ?

Answer. As far as I could judge, I should think him one of the best in the country.

Question. Did you know of his being employed as architect and superintendent in the erection of the New York custom-house ?

Answer. I did.

Question. How early did you know of his being engaged upon the custom-house ?

Answer. I know of his being so employed in 1840, and sometime earlier.

Question. How late did you know of his being so employed ?

Answer. Until the spring of 1842, the early part of the spring.

Question. During the time he was so employed, what proportion of his time did he devote to this business ?

Answer. He made it his business to attend to the erection of the custom-house ; he had no other business that I am aware of ; he gave all the time to it that his health permitted, and I have known him to go there in a carriage when he was not really well enough safely to go out. He was the principal architect and superintendent employed on the work.

Question. Did you know of his making journeys to Washington on business of the custom-house ?

Answer. I did. I recollect of his going twice. I cannot specify how many times more.

Question. Do you know whether he prepared the plans and drawings for the custom-house ?

Answer. I know of his being occupied in preparing plans and drawings for that purpose.

Question. Do you know of his superintending the construction of the furniture for the custom-house ?

Answer. I went with him on several occasions, and heard him give directions about the furniture for the custom-house.

Question. Do you recollect of his superintending the finishing and ornamental work for the custom-house ?

Answer. I recollect going there with him several times, and know of his giving directions as to this part of the work ; on one occasion in particular, as to the lettering over the doors.

Question. Do you know anything of the compensation usually received by architects for professional services ?

Answer. I do not ; but I consider him proficient in his profession, and entitled to as much for his services as any other in the profession.

Question. Can you state what induced the disease of which Mr. Frazee died?

Answer. He was ill at times during his superintendence of the custom-house. I was with him often when he was ill, and I believe this illness was occasioned by his exposure to dampness in the room he occupied in the basement of the custom-house while engaged there. I do not think he was ever well afterwards.

Question. Do you know of any other matter relative to the matter in question?

Answer. Mr. Frazee became very much embarrassed in his circumstances, and, towards the close of his life, destitute, in consequence of the withholding by the government of his compensation; his property, including some real estate in this city, was sacrificed; his health was very much impaired; he was mentally a great deal broken down by the embarrassment and disappointment thus occasioned; he left nothing for his family after his death. I know nothing further as to this claim that I now recollect.

STEPHEN C. DURYEA.

Adjourned to February 19, 1857.

FEBRUARY 19, 1857.

The petitioner appears, by E. J. Phelps, esq., her counsel—no one appearing on behalf of the government.

R. E. Launitz, being sworn and examined on the part of the petitioner, deposes and says as follows:

My name is R. E. Launitz; I am a sculptor by profession; I have resided in New York for many years, ever since 1828; I am forty years of age and upwards; I have no interest, direct or indirect, in the claim which is the subject of inquiry in above action, and I am in no way related or connected with the claimant.

Question. Did you know the late John Frazee; what was his profession, and what were his qualifications and standing in his profession?

Answer. I was acquainted with him; he was a sculptor and architect of very high accomplishments and standing.

Question. Did you know of his being engaged as architect and superintendent of the New York custom-house when building, and from what time to what time?

Answer. I knew Mr. Frazee was engaged as architect and superintendent of the custom-house while it was being constructed; he commenced under his first appointment in the year 1836; I know the date from having been at that time, and for a few months after, his partner; he continued in the work until December, 1840, when he was discharged by Mr. Bowne; after that, about the 3d of March, 1841, he was reappointed by the Secretary of the Treasury, and continued to act as superintendent until the building was finished, and taken possession of by the government, which was in the summer of 1842; he also designed all the fixtures, railings, &c.

Question. While Mr. Frazee was so engaged, what proportion of

his time did he give to the work, and how diligently did he apply himself to it?

Answer. To the best of my knowledge, all the time—from morning till night; he had no other business; he superintended the whole work; he made all the models and drawings; I have now in my possession all these original drawings; I took them of him for a debt; he employed a young man as draughtsman, whom he paid out of his own pocket; he made the custom-house his hobby, and spared no time nor study, thinking it would establish his reputation.

Question. What were Mr. Frazee's services worth by the day while he was engaged in the work?

Answer. Considering his reputation and his talents, I should think ten dollars a day would have been a fair compensation, considering he had constant employment.

Question. What was the effect on Mr. Frazee's health by his employment on the custom-house?

Answer. The dampness of the building was such that he contracted a chronic rheumatism, of which he never recovered; it made a complete cripple of him, so that he could not work or write; before he died he was so reduced in circumstances that a subscription was raised for him among his brother artists.

Question. Did you know of Mr. Frazee, while he was engaged on the custom-house, having to visit the quarries from which the marble was obtained for the custom-house, and how often?

Answer. I know that he kept a horse and buggy for that purpose; he used to visit the quarries, but I cannot tell how often.

Question. Do you know of his being called on to visit Washington on the business of the custom-house, and how often, and for how long time?

Answer. I know he had to go on that business to Washington several times; I cannot tell by what authority, nor how long he remained there.

Question. What effect upon Mr. Frazee's circumstances did his failure to obtain his compensation from government produce?

Answer. He was unable to pay the living expenses of his family; he was always dependent upon his profession for his support; I used to lend him money; he once offered me his wife's watch as security, which I declined to take.

ROB'T E. LAUNITZ.

JUNE 29, 1857.

The claimant appeared, by E. J. Phelps, esq., to proceed with the examination.

Dr. John W. Francis, a witness produced and sworn on the part of the claimant, testified as follows:

My name is John W. Francis; I am a physician; am upwards of sixty years of age; I have resided in the city of New York for the past, and for many years; I have no interest, direct or indirect, in the claim which is the subject of inquiry in above action, and I am not related to the petitioner.

Question. Were you acquainted with the late John Frazee, and how long before his death?

Answer. I was acquainted with him for twenty years before his death.

Question. What, in your judgment, were Mr. Frazee's abilities and acquirements as an architect, and his standing in that profession?

Answer. He was considered a man of great genius; before his connexion with the custom-house he had acquired a high reputation as an architect and sculptor, particularly as a sculptor; he was acknowledged to be a man of great taste as an architect; and the examination of the custom-house in New York by enlightened foreigners, who have visited this place from time to time, has often led to the remark that the custom-house is the only real fire-proof building in this city, and is a triumph of mechanical skill; his private character was that of a man of great integrity, of temperate habits, of untiring industry, and of great devotion to his professional calling.

Question. Do you know anything of his services in the erection of the custom-house?

Answer. I know that he was incessantly occupied with it, late and early, and that all his thoughts seemed occupied upon it.

Question. Do you know anything of his last sickness?

Answer. He suffered a great deal from rheumatic attacks of the body and affections of the chests, superinduced by exposure to the changes and vicissitudes of the seasons, and the dampness of the custom-house while in the state of erection. I believe the labors upon that edifice shortened his life. He suffered considerable mental disappointment and distress from his pecuniary transactions with the government and the postponement of his claims.

Question. Do you know of any other matter relative to the matter in question?

Answer. I am not aware that I do.

JOHN W. FRANCIS, *M. D.*,
New York.

JULY, 1, 1857.

The claimant appeared, by E. J. Phelps, esq., to proceed with the examination.

Jesse Hoyt, a witness produced and sworn on the part of the claimant, testified as follows:

My name is Jesse Hoyt; I am a counsellor at law; I have resided in New York for many years; I am fifty years of age and upwards; I have no interest, direct or indirect, in the claim which is the subject of inquiry in above action, and am not related to or connected with the petitioner.

Question. Were you collector of the port of New York, and during what time?

Answer. I was, from the 29th of March, 1838, to the close of February, 1841. The new custom-house, so called, was in the process of erection during that period, and I was *ex officio* a commissioner for building the new custom-house.

Question. What do you know of the services of Mr. John Frazee as architect and superintendent of the custom-house?

Answer. When I went into office Mr. Frazee was occupied as architect and superintendent of the custom-house, and he had been so for a long time previous thereto. He continued to act in that capacity until the building was completed, with the reservation hereafter to be mentioned, that is to say : sometime in the beginning of December, 1840, Mr. Walter Bowne, the chief commissioner, without consulting or advising with the deponent, took upon himself the responsibility of dismissing Mr. Frazee from the station referred to, Mr. Bowne assuming that the custom-house was finished. Deponent was informed of that proceeding by Mr. Frazee, when *deponent advised Mr. Frazee to remain in the building as usual, until deponent could make a report to Mr. Woodbury, then Secretary of the Treasury*, and obtain his directions thereon. Mr. Bowne and deponent were so far apart in their views upon the question, that the Secretary referred the matter, as deponent is informed, to the naval officer and surveyor of the port to report upon the difference of opinion that existed between Mr. Bowne and deponent. Those officers made their report to the Secretary, confirming the views of the deponent, as deponent thinks ; whereupon the Secretary of the Treasury directed that Mr. Frazee be continued as architect and superintendent ; and he did so continue until it was conceded that the custom-house was completed by the Treasury Department. Deponent on one occasion, and deponent thinks in March, 1844, when the subject was more fresh in the mind of deponent than it could be at present, wrote a letter to Mr. Frazee on the subject, the draught of which letter was destroyed by fire at the office of deponent some three or four years since ; but if petitioner should have the original letter as engrossed, deponent would prefer that it should be attached to this deposition.

Question. What, in your opinion, was the ability and standing of Mr. Frazee in his profession, and what the character of his services upon this work ?

Answer. Mr. Frazee was a great enthusiast in his profession ; his character as a man of science in that profession stood very high ; he was very much devoted to the building as a matter of professional pride as well as duty. Deponent was so much occupied by the duties of his office proper that he had not the opportunity to devote any particular attention to the work as it progressed, and he only attended the commissioners when officially necessary. The financial accounts of the commission were kept entirely under the control of Mr. Bowne, and deponent never saw or examined them.

Question. Do you recollect Mr. Frazee's journeys to Washington on the business of the commission ?

Answer. He made several during the progress of the work.

Question. What, at that time, was the usual expense of a journey to Washington, apart from the expense of remaining there ?

Answer. Deponent went to Washington but one time during the whole time he was in office. The expense at that day was about thirty dollars.

Question. Do you know of any other matter relative to the matter in question ?

Answer. Deponent thinks he might state here that one of the

causes of differences of opinion between deponent and Mr. Bowne, his associate, was the danger that would arise to the health of the officers of the customs who were to occupy the building if they took possession at that season of the year, and in the condition in which the building then was ; and deponent is under the impression and belief that the health of Mr. Frazee was very much affected by being almost constantly under the influence of the atmosphere of the building.

J. HOYT.

UNITED STATES OF AMERICA, *State, City, and County of New York, ss :*

On the several days as hereinbefore stated, before me, a commissioner of the Court of Claims, personally came Stephen C. Duryea, Robert E. Launitz, John W. Francis, and Jesse Hoyt, witnesses above named for the claimant, and after having been sworn severally to tell the truth, the whole truth, and nothing but the truth, the questions contained in their within depositions, respectively, were written down in the presence of and proposed to the witnesses ; and the answers thereto were also written down in presence of the witnesses, who subscribed their depositions as certified by me.

The said depositions of Stephen C. Duryea, Robert E. Launitz, John W. Francis, and Jesse Hoyt, were taken by me, at the request of Wakeman, Latting, and Phelps, counsel for claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Lydia Frazee. The government, as appears by the notice and admission of service herewith, was notified, but did not attend or object.

JOHN C. DEVEREUX,
Court of Claims Commissioner.

COURT OF CLAIMS.

LYDIA FRAZEE *vs.* THE UNITED STATES.

I hereby certify that the above is a true copy of depositions taken and returned by me in this case.

JOHN C. DEVEREUX,
Commissioner, &c.

NEW YORK, *August 7, 1857.*

COURT OF CLAIMS.

LYDIA FRAZEE, claimant, *vs.* THE UNITED STATES.

Notice of taking depositions.

SIR : The court having authorized the taking of depositions in this case, you are hereby notified that the following witnesses, namely: James Stone, George F. Talman, Jesse Hoyt, George W. Coe, Ely Moore, Daniel Jackson, Alexander Masterton, James Hall, Robert E.

Launitz, John McKeon, Martin E. Thompson, George Griswold, Stephen S. Duryea, John R. Place, Cornelius R. Bogardus, Joseph Wilson, and William L. Swan, will be examined, on behalf of the claimant above named, before John C. Devereux, esq., one of the permanent commissioners of this court, residing in the city of New York, at the office of the said commissioner, No. 110 Broadway, in the city of New York, on the 2d day of December, 1856, at 12 o'clock at noon of that day.

Yours, &c.,

JNO. J. LATTING,
Solicitor for Claimant.

MONTGOMERY BLAIR, Esq.,
Solicitor for the United States.

NEW YORK, November 14, 1856.

I admit due service of a notice, of which the foregoing is a copy, at Washington city, D. C., this 15th day of November, 1856.

M. BLAIR, *United States Solicitor.*

UNITED STATES COURT OF CLAIMS.

LYDIA FRAZEE *vs.* THE UNITED STATES.

Depositions of witnesses produced, sworn, and examined in the above entitled cause on the part of the petitioner.

DECEMBER 6, 1856.

The petitioner appears, by E. J. Phelps, esq., her counsel—no one appearing on behalf of the government. (Adjourned from December 2, 1856.)

Stephen C. Duryea, being sworn and examined on the part of the petitioner, deposes and says as follows :

My name is Stephen C. Duryea ; I am employed in the county clerk's office of the city of New York ; I am in my forty-third year ; I have resided in New York all my life ; I have no interest, direct or indirect, in the claim which is the subject of inquiry in above action ; and I am distantly related to the petitioner ; the claimant's father and my father were half brothers.

Question. Were you acquainted with John Frazee in his lifetime, and how long?

Answer. I was acquainted with him during the twelve years preceding his death.

Question. What was his profession?

Answer. He was a sculptor and architect.

Question. What, in your judgment, were his qualifications and standing in that profession?

Answer. As far as I could judge, I should think him one of the best in the country.

Question. Did you know of his being employed as architect and superintendent in the erection of the New York custom-house?

Answer. I did.

Question. How early did you know of his being engaged upon the custom-house?

Answer. I know of his being so employed in 1840, and sometime earlier.

Question. How late did you know of his being so employed?

Answer. Until the spring of 1842, the early part of the spring.

Question. During the time he was so employed, what proportion of his time did he devote to this business?

Answer. He made it his business to attend to the erection of the custom-house. He had no other business, that I am aware of. He gave all the time to it that his health permitted; and I have known him to go there in a carriage when he was not really well enough safely to go out. He was the principal architect and superintendent employed on the work.

Question. Did you know of his making journeys to Washington on business of the custom-house?

Answer. I did. I recollect of his going twice. I cannot specify how many times more.

Question. Do you know whether he prepared the plans and drawings for the custom-house?

Answer. I know of his being occupied in preparing plans and drawings for that purpose.

Question. Do you know of his superintending the construction of the furniture for the custom-house?

Answer. I went with him on several occasions, and heard him give directions about the furniture for the custom-house.

Question. Do you recollect of his superintending the finishing and ornamental work for the custom-house?

Answer. I recollect going there with him several times, and know of his giving directions as to this part of the work, on one occasion in particular, as to the lettering over the doors.

Question. Do you know anything of the compensation usually received by architects for professional services?

Answer. I do not; but I consider him proficient in his profession, and entitled to as much for his services as any other in the profession.

Question. Can you state what induced the disease of which Mr. Frazee died?

Answer. He was ill at times during his superintendence of the custom-house. I was with him often when he was ill; and I believe this illness was occasioned by his exposure to dampness in the room he occupied in the basement of the custom-house while engaged there. I do not think he was ever well afterwards.

Question. Do you know of any other matter relative to the matter in question?

Answer. Mr. Frazee became very much embarrassed in his circumstances, and, towards the close of his life, destitute, in consequence of the withholding by the government of his compensation. His property, including some real estate in this city, was sacrificed; his health was very much impaired; he was mentally a great deal broken down

by the embarrassment and disappointment thus occasioned. He left nothing for his family after his death.

I know nothing further as to this claim that I now remember.

STEPHEN C. DURYEA.

Witness:

JOHN C. DEVEREUX,
Commissioner, &c.

Adjourned to February 19, 1857.

FEBRUARY 19, 1857.

The petitioner appears, by E. J. Phelps, esq., her counsel—no one appearing on behalf of the government.

R. E. Launitz, being sworn and examined on the part of the petitioner, deposes and says as follows:

My name is R. E. Launitz; I am a sculptor by profession; I have resided in New York for many years, ever since 1828; I am forty years of age and upwards; I have no interest, direct or indirect, in the claim which is the subject of inquiry in above action; and I am in no way related or connected with the claimant.

Question. Did you know the late John Frazee? What was his profession, and what were his qualifications and standing in his profession?

Answer. I was acquainted with him; he was a sculptor and architect of very high accomplishments and standing.

Question. Did you know of his being engaged as architect and superintendent of the New York custom-house when building; and from what time to what time?

Answer. I knew Mr. Frazee was engaged as architect and superintendent of the custom-house while it was being constructed. He commenced under his first appointment in the year 1836. I know the date from having been at that time, and for a few months after, his partner. He continued in the work until December, 1840, when he was discharged by Mr. Bowne. After that, about the 3d of March, 1841, he was reappointed by the Secretary of the Treasury, and continued to act as superintendent until the building was finished and taken possession of by the government, which was in the summer of 1842. He also designed all the fixtures, railings, &c.

Question. While Mr. Frazee was so engaged, what proportion of his time did he give to the work; and how diligently did he apply himself to it?

Answer. To the best of my knowledge, all the time—from morning till night. He had no other business. He superintended the whole work; he made all the models and drawings. I have now in my possession all these original drawings. I took them of him for a debt. He employed a young man as draughtsman, whom he paid out of his own pocket. He made the custom-house his hobby, and spared no time nor study, thinking it would establish his reputation.

Question. What were Mr. Frazee's services worth by the day while he was engaged in the work?

Answer. Considering his reputation and his talents, I should think ten dollars a day would have been a fair compensation, considering he had constant employment.

Question. What was the effect on Mr. Frazee's health by his employment on the custom-house?

Answer. The dampness of the building was such that he contracted a chronic rheumatism, of which he never recovered. It made a complete cripple of him, so that he could not work or write. Before he died he was so reduced in circumstances, that a subscription was raised for him among his brother artists.

Question. Did you know of Mr. Frazee, while he was engaged on the custom-house, having to visit the quarries from which the marble was obtained for the custom-house, and how often?

Answer. I know that he kept a horse and buggy for that purpose. He used to visit the quarries, but I cannot tell how often.

Question. Do you know of his being called on to visit Washington on the business of the custom-house, and how often, and for how long time?

Answer. I know he had to go on that business to Washington several times. I cannot tell by what authority, nor how long he remained there.

Question. What effect upon Mr. Frazee's circumstances did his failure to obtain his compensation from government produce?

Answer. He was unable to pay the living expenses of his family. He was always dependent upon his profession for his support. I used to lend him money; he once offered me his wife's watch as security, which I declined to take.

ROBERT E. LAUNITZ.

Witness:

JOHN C. DEVEREUX,
Commissioner, &c.

JUNE 29, 1857.

The claimant appeared, by E. J. Phelps, esq., to proceed with the examination.

Dr. John W. Francis, a witness produced and sworn on the part of the claimant, testified as follows:

My name is John W. Francis; I am a physician; am upwards of sixty years of age. I have resided in the city of New York for the past, and for many years. I have no interest, direct or indirect, in the claim which is the subject of inquiry in above action, and I am not related to the petitioner.

Question. Were you acquainted with the late John Frazee, and for how long before his death?

Answer. I was acquainted with him for twenty years before his death.

Question. What, in your judgment, were Mr. Frazee's abilities and acquirements as an architect and his standing in that profession?

Answer. He was considered a man of great genius. Before his connexion with the custom-house he had acquired a high reputation as an architect and sculptor, particularly as a sculptor. He was acknowledged to be a man of great taste as an architect; and the ex-

amination of the custom-house in New York, by enlightened foreigners, who have visited this place from time to time, has often led to the remark that the custom-house is the only real fire-proof building in this city, and is a triumph of mechanical skill. His private character was that of a man of great integrity, of temperate habits, of untiring industry, and of great devotion to his professional calling.

Question. Do you know anything of his services in the erection of the custom-house?

Answer. I know that he was incessantly occupied with it late and early, and that all his thoughts seemed to be occupied upon it.

Question. Do you know anything of his last sickness?

Answer. He suffered a great deal from rheumatic attacks of the body and affections of the chest, superinduced by exposure to the changes and vicissitudes of the season and the dampness of the custom-house while in the state of erection. I believe the labors upon that edifice shortened his life. He suffered considerable mental disappointment and distress from his pecuniary transactions with the government and the postponement of his claims.

Question. Do you know of any other matter relative to the matter in question?

Answer. I am not aware that I do.

JOHN W. FRANCIS, *M. D.*,
New York.

Witness:

JOHN C. DEVEREUX,
Commissioner.

JULY 1, 1857.

The claimant appeared, by E. J. Phelps, esq., to proceed with the examination.

Jesse Hoyt, a witness produced and sworn on the part of the claimant, testified as follows:

My name is Jesse Hoyt; I am a counsellor at law; I have resided in New York for many years; I am fifty years of age and upwards; I have no interest, direct or indirect, in the claim which is the subject of inquiry in above action; and am not related to or connected with the petitioner.

Question. Were you collector of the port of New York, and during what time?

Answer. I was, from the 29th of March, 1838, to the close of February, 1841. The new custom-house, so-called, was in the process of erection during that period, and I was *ex officio* a commissioner for building the new custom-house.

Question. What do you know of the services of Mr. John Frazee as architect and superintendent of the custom-house.

Answer. When I went into office Mr. Frazee was occupied as architect and superintendent of the custom-house, and he had been so for a long time previous thereto. He continued to act in that capacity until the building was completed, with the reservation hereafter to be mentioned, that is to say: sometime in the beginning of December, 1840, Mr. Walter Bowne, the chief commissioner, without consulting

or advising with the deponent, took upon himself the responsibility of dismissing Mr. Frazee from the station referred to, Mr. Bowne assuming that the custom-house was finished. Deponent was informed of that proceeding by Mr. Frazee, when deponent advised Mr. Frazee to remain in the building as usual, until deponent could make a report to Mr. Woodbury, then Secretary of the Treasury, and obtain his directions thereon. Mr. Bowne and deponent were so far apart in their views upon the question, that the Secretary referred the matter, as deponent is informed, to the naval officer and surveyor of the port to report upon the difference of opinion that existed between Mr. Bowne and deponent. Those officers made their report to the Secretary, confirming the views of the deponent, as deponent thinks; whereupon the Secretary of the Treasury directed that Mr. Frazee be continued as architect and superintendent; and he did so continue until it was conceded that the custom-house was completed by the Treasury Department. Deponent, on one occasion, and deponent thinks in March, 1844, when the subject was more fresh in the mind of deponent than it could be at present, wrote a letter to Mr. Frazee on the subject, the draught of which letter was destroyed by fire at the office of deponent some three or four years since; but if the petitioner should have the original letter as engrossed, deponent would prefer that it should be attached to this deposition.

Question. What, in your opinion, was the ability and standing of Mr. Frazee in his profession, and what the character of his services upon this work.

Answer. Mr. Frazee was a great enthusiast in his profession, his character as a man of science in that profession stood very high; he was very much devoted to the building as a matter of professional pride as well as duty. Deponent was so much occupied by the duties of his office proper that he had not the opportunity to devote any particular attention to the work as it progressed, and he only attended the commissioners when officially necessary. The financial accounts of the commission were kept entirely under the control of Mr. Bowne, and deponent never saw nor examined them.

Question. Do you recollect Mr. Frazee's journeys to Washington on the business of the commission?

Answer. He made several during the progress of the work.

Question. What at that time was the usual expense of a journey to Washington, apart from the expense of remaining there?

Answer. Deponent went to Washington but one time during the whole time he was in office. The expense at that day was about thirty dollars.

Question. Do you know of any other matter relative to the matter in question?

Answer. Deponent thinks he might state here that one of the causes of differences of opinion between deponent and Mr. Bowne, his associate, was the danger that would arise to the health of the officers of the customs who were to occupy the building if they took possession at that season of the year, and in the condition in which the building then was; and deponent is under the impression and belief that

the health of Mr. Frazee was very much affected by being almost constantly under the influence of the atmosphere of the building.

J. HOYT.

Witness :

J. C. DEVEREUX,
Commissioner, &c.

UNITED STATES OF AMERICA,
State, City, and County of New York, } ss:

On the several days as hereinbefore stated, before me, a commissioner of the Court of Claims, personally came Stephen C. Duryea, Robert E. Launitz, John W. Francis, and Jesse Hoyt, witnesses above named for the claimant, and after having been sworn, severally, to tell the truth, the whole truth, and nothing but the truth, the questions contained in their written depositions, respectively, were written down in the presence of and proposed to the witnesses; and the answers thereto were also written down in presence of the witnesses, who subscribed their depositions as certified by me.

The said depositions of Stephen C. Duryea, Robert E. Launitz, John W. Francis, and Jesse Hoyt, were taken by me at the request of Wakeman, Latting, and Phelps, counsel for claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Lydia Frazee. The government, as appears by the notice and admission of service herewith, was notified, but did not attend or object.

JOHN C. DEVEREUX,
Court of Claims Commissioner.

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT, *March 18, 1859.*

Pursuant to the act of Congress of 22d February, 1849, I hereby certify that the annexed papers are true copies of letters taken from the files and records of this department.

In witness whereof, I have hereunto set my hand, and caused the [L. s.] seal of the Treasury Department to be affixed, on the day and year first above written.

HOWELL COBB,
Secretary of the Treasury.

A.

OFFICE OF THE COMMISSION FOR BUILDING CUSTOM-HOUSE,
New York, February 2, 1841.

SIR : Your letter of the 30th ultimo is received. In reply, we state that the building is entirely finished; and with regard to the furnishing thereof, that the counters and desks for the collector's and naval officers' rooms will be done in ten days.

Since the superintendent has been paid off, no work, except point-

ing marble joints, cleaning and scrubbing down the building, has been done, except for contracts and specific agreements for laying flagging, &c., which, obviously, required no aid of the superintendent.

We have not, in the slightest manner, made any innovations on the architectural plans for finishing the building. The difference of opinion in furnishing for occupancy is between an *architect* and *business men*. The architect's arrangement would cause long delay and expense to a large amount, whilst the others will be completed in less than one month, and at an expense of less than fifteen thousand dollars.

Bronzing the iron work, if considered necessary, and that the light will permit, should not be done for a year or two.

The entrance doors to this building are constructed with an upper stationary door, which shows a double panel of the door in all its beauty. The fly-doors are put up in a range with the doors to open, and do not obstruct the view of them. These fly-doors are very neatly finished, and on the same plan as the banks lately put up in Wall street. A temporary fly-door is contemplated to be put up inside the large room door entrance.

There only remains, to complete entirely this great work, the finishing of the area on Nassau street, and the putting up iron railings outside, which is delayed by the winter. It will not, however, require six days to do this work when the ice disappears. Our opinion is that no further service is required of Mr. Frazee.

We are, sir, very respectfully, your obedient servants,

WALTER BOWNE,
Commissioner.

Hon. LEVI WOODBURY,
Secretary of the Treasury, Washington.

Mr. Hoyt will probably write to you himself.

W. B.

B.

CUSTOM-HOUSE, *New York, March 25, 1841.*

SIR: There was a long-continued controversy between John Frazee, architect of the custom-house, and Walter Bowne, esq., the acting commissioner. The late Secretary, after much inquiry and examination, decided that Mr. Frazee should go on to finish the custom-house, and furnish it in *his* own way and without the interference of Mr. Bowne, who differs in opinion with the architect.

Mr. Bowne, I am told, claims heavy compensation from the United States for his services; and, to save further expense, he ought to be dismissed, and required to render his account.

Charles A. Davis, esq., of the firm of Davis, Brooks & Co., merchants of high standing, has consented, at my request, to act as commissioner in the place of Mr. Bowne, *without compensation*.

Mr. Frazee, the architect, has agreed with me, in case Mr. Bowne

be removed, to serve *for nothing* from and after the first day of May next. I enclose his note to me, making that offer.

Mr. Rodman, clerk in your office, is acquainted with this whole subject. If you wish to know anything more of Mr. Davis, you may learn of Mr. Granger or Mr. Webster. He is the real *Jack Downing*, a very distinguished friend of Mr. Clay, and a high-minded, honorable and respectable person.

Very respectfully, yours, &c.,

EDWARD CURTIS.

Hon. THOMAS EWING,

Secretary of the Treasury.

C.

NEW CUSTOM-HOUSE,

New York, March 23, 1841.

SIR : It is far from my wishes, and ever has been, to be the cause of any unnecessary expenditures upon this building beyond what strict propriety, good taste and good sense seemed to require. I have added no expense whatever which was not proper in the carrying out and completing this edifice agreeably to the designs and plans that were approved of and authorized by the government.

To convince you that I am desirous to give my support to a judicious economy with the public treasure, I will, from and after the first day of May next, render my service upon the building, as superintendent and architect, until every part of the work shall be completed, without charge or compensation.

I am, very truly, yours,

JOHN FRAZEE.

EDWARD CURTIS, Esq.,

Collector of the Customs, New York.

D.

TREASURY DEPARTMENT, *April 12, 1841.*

SIR : The quarterly account of disbursements for the new custom-house, forwarded in your letter of the 1st instant, has, with the accompanying vouchers, been referred to the accounting officers of the treasury for adjustment.

The department having appointed George F. Tallman, esq., of New York, commissioner and disbursing agent for the new custom-house, you are, consequently, relieved from the future discharge of those duties.

I have, therefore, respectfully to request you to hand over to Mr. Tallman all books and papers belonging to the office, together with any public funds remaining in your hands unexpended.

I am, &c.,

T. EWING,

Secretary of Treasury.

WALTER BOWNE, Esq.,

Late Comm'r and Disbursing Ag't., &c., New York.

U. S. COURT OF CLAIMS.

LYDIA FRAZEE, ADMINISTRATRIX, *vs.* THE UNITED STATES.*Brief for the claimant.*

The petition sets forth that John Frazee, whom the claimant represents as administratrix, was employed by the commissioners for the erection of the New York custom-house, under the authority of the Secretary of the Treasury, as architect and superintendent of that work, from July 22, 1835, to May 21, 1842, when it was completed; that his compensation (after May 24, 1837, when it was increased by the Secretary of the Treasury,) was to be nine dollars per diem; that he faithfully and ably performed the required duty; and that the government is still indebted to him for four hundred and fifty-six days' services, and for two hundred and seven dollars and thirty-nine cents expenses incurred in travelling to Washington on the necessary business of his employment, at the request of the commissioners who had it in charge, deducting the sum of five hundred and sixty-one dollars subsequently received.

Thus—456 days, at \$4.....	\$4,104 00
Travelling expenses.....	207 39
	4,311 39
Payment.....	561 00
	3,750 39

The claim rests upon an express contract with the government, entered into on their part by the proper officers, acting under legal authority, and fully performed on the part of the claimant, resulting in a benefit to the government far exceeding the stipulated compensation.

If these facts are established, there can be no question as to the claimant's right.

The employment of Mr. Frazee as early as 1837, and the compensation he was to receive, is shown by the letter of May 19, 1837, from the commissioners for building the custom-house to the Secretary of the Treasury, and his reply, dated May 24, 1837, (Ex. Nos. 1 and 2.) The commissioners' letter speaks of "the close application and arduous services of Mr. Frazee in his situation of superintendent and architect," expresses "entire confidence in his talents and ability to carry forward the building to 'its completion,'" &c., and recommend an increase of his compensation from seven to nine dollars per diem. The reply of the Secretary authorizes the proposed increase.

Also by the letter of the Secretary of the Treasury to Walter Bowne, one of the commissioners, dated March 3, 1841, (Ex. No. 3,) in which, referring to a difference between Mr. Frazee and one of the commissioners who had undertaken to dismiss him, the Secretary directs that he "be *continued* in his situation of superintendent and architect from the date of the passage of the appropriation bill of that year

until *the completion of the work*," and the Secretary's letter of the same date to Mr. Frazee, enclosing a copy of the letter to Mr. Bowne.

Also by the evidence of Mr. Jesse Hoyt, who was collector and one of the commissioners for building the custom-house, from 1838 to 1841; he proves Mr. Frazee's employment by the commissioners, under the authority of the Treasury Department, from 1838 to the completion of the work; explains the difficulty between Mr. Frazee and Mr. Bowne, and states that the instructions of the Secretary, in the letter of March 3, 1841, (Ex. No. 3,) were followed by the commissioners.

The high abilities and eminent professional qualifications of Mr. Frazee, his enthusiastic devotion to the progress and success of this work, and his arduous and unintermitting services in it, to the exclusion of all other occupation, up to its final completion in 1842, covering the time now charged for, are fully shown by the testimony of Mr. Hoyt, that of Messrs. Launitz and Duryea, and of Dr. Francis, and by the letter of Mr. Curtis. (Ex. No. 5.)

It also appears that from the exposure incurred in the discharge of his duties upon the custom-house, he contracted a disease which carried him to his grave, and that his last days were harassed and embittered by pecuniary embarrassment, arising out of his failure to obtain from the government the compensation that was due him.

The character of the building which Mr. Frazee designed and erected, as a pure architectural model, and admirably adapted to the purposes of its construction, is forcibly stated in the evidence of Dr. Francis. There can be no question that the claimant would be entitled to a much larger sum than he now asks if he could recover upon a *quantum meruit*, unrestricted by his contract.

The testimony of the same witnesses also proves that in the course of his employment Mr. Frazee made several journeys to Washington, at the request of the commissioners, to make the explanations requisite to obtain the necessary appropriations for the work, and that the cost of a journey at that time, exclusive of expenses while at Washington, was about thirty dollars.

The account of these items, as now presented, was prepared and sworn to by Mr. Frazee in his lifetime. Strict proof of them of course cannot now be given. It is shown, however, that such expenses were incurred by him, and that the amount could not reasonably or probably have been less than the sum charged.

The failure of the appropriation for the work was the original cause of the omission to pay Mr. Frazee. An unfortunate mistake caused his claim to be stricken out of the next appropriation bill, and a special application to Congress then became necessary. Unfitted and unaccustomed as Mr. Frazee was for the prosecution of such business, and enfeebled and broken by disease and disappointment, the slender means within his control were quite inadequate to obtain the just or definite action of Congress upon his case while he lived. His widow, left destitute, is now compelled by necessity to press it upon the government.

E. J. PHELPS,
Of counsel for Claimant.

IN THE COURT OF CLAIMS.

LYDIA FRAZEE, ADMINISTRATRIX, *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF UPON REARGUMENT UPON THE MERITS.

Claim for services rendered by John Frazee, deceased, as an architect on the New York custom-house between the 5th day of December, 1840, and the 21st day of May, 1842, 456 days, at \$9 per day.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

1. That prior to the 5th of December, 1840, John Frazee had been employed as an architect upon the custom-house in New York, and had been paid for his services.

This fully appears from the petition and papers in the case, and is not questioned.

2. That he received on account of his services, between the 3d of March, 1841, and the 21st of May, 1842, the sum of \$561.

This is conceded in the petition and the copy of account furnished, found among the papers.

3. That when first employed, prior to 1840, his compensation was fixed at \$7 per day, which was increased on the 4th of May, 1837, to \$9.

See letter of Bowne and others of May 19, 1837, to the Secretary of the Treasury soliciting an increase of two dollars a day in addition to the seven then received, and his reply of the 24th authorizing it.

4. That he was discharged from employment by Commissioner Bowne on the 5th of December, 1840, because he considered the custom-house, so far as architectural services were concerned, as completed.

Launitz testifies that "he continued in the work until December, 1840, when he was discharged by Mr. Bowne."

Hoyt testified that he was employed until "some time in the beginning of December, 1840. Mr. Walter Bowne, the chief commissioner, without consulting or advising with the deponent, took upon himself the responsibility of dismissing Mr. Frazee from the station referred to, Mr. Bowne assuming that the custom-house was finished."

5. He was *authorized* to be reinstated by a letter from the Secretary dated on the 3d of March, 1841.

Mr. Woodbury, in his letter to Mr. Bowne, says: "I deem it proper to authorize Mr. John Frazee to be continued in the situation of superintendent and architect of the building from the date of the passage of the general appropriation bill until the custom-house and the furnishing the respective rooms shall have been completed, and it is desirable that Mr. Frazee's plans for the interior arrangements of the building should be carried into effect so far as regards the arrangements of the fly-doors, furniture, and painting of the iron work."

6. An appropriation bill passed on the 3d of March, 1841, (5. U. S. L., 419,) but contained no appropriation for continuing the work on the custom-house or purchasing furniture, but provided \$34,321 21 (pp. 428-9) to pay *arrears*.

7. There is no evidence that Mr. Bowne did, in fact, again employ Frazee, although authorized to do so, and probably because there was no appropriation out of which he could be paid.

From the evidence of Hoyt, who opposed Bowne's course, it would seem probable that Frazee remained at the custom-house after this authority to Bowne as he had done before, without employment by Bowne at all.

8. From December 5, 1840, to March 3, 1841, Frazee was not employed and did not serve the government, and there is no proof that he rendered any service after early in the spring of 1842.

Duryea swears he continued "until the spring of 1842—the early part of the spring."

Launitz testified that he continued employed "until the building was finished and taken possession of by the government, which was in the summer of 1842."

Neither of these witnesses fixes the exact time of the termination of Frazee's services.

Frazee, in a letter dated 10th December, 1840, (Rep. Com. 1065, p. 23,) dates a letter from the "New Custom-house, New York."

9. Frazee made two journeys to Washington during the time that he was employed, but whether during his first or second employment is not shown.

Duryea says he recollects Frazee's going twice to Washington, but gives no date.

Launitz says he knows "he had to go to Washington several times. He cannot tell by what authority or how long he remained there."

He gives no dates to these journeys.

10. There is evidence that Frazee, if at the custom-house after the 1st May, 1841, did not expect pay, and probably because there was no appropriation to pay him, and therefore Bowne did not again employ him.

Edward Curtis, in a letter of June 10, 1842, addressed to R. W. Thompson, chairman, &c., (Rep. 1065, p. 46,) says:

"Mr. Frazee did make a communication to me that after the 1st of May, 1841, he would serve gratuitously until the furnishing and finishing of the custom-house was completed. The communication was made some time in March, 1841, and at the same time Mr. F. stated, in conversation, "if paid for that time (a few months) during which Mr. Bowne had kept him out of his pay, he was willing to serve three or four months for nothing for the sake of having the furniture conform to his ideas of propriety, and to have the building finished completely and properly. It was then thought that everything could be made ready for occupation some time in July."

Curtis, in another letter to the Secretary of the Treasury, dated 7th April, 1841, (found in the same report, pp. 35-6,) says:

"Mr. Frazee feels a just pride as the architect of the building, and hence his consent to superintend the completion of the building and the fitting up of the furniture without compensation after the 1st of May."

11. Frazee's services from the 3d of March, 1841, to the 1st of May next thereafter would be 58 days, and at \$9 per day would

amount to \$522, and his account admits the payment in cash of that precise sum.

He was not entitled to pay from 5th of December, 1840, to the 3d of March, 1841, and after the 1st of May, 1841, he was not entitled to pay, because there was no appropriation, and he proposed to do what there was for him to do without compensation for the reasons assigned in Curtis' letter.

It follows that for his services rendered under expectation of pay he has been fully paid, and in fact \$39 over, in work performed by government employés for him, as appears in his account.

12. There is no evidence showing that it was a portion of Frazee's official business to go to Washington.

His own account states that he was there in the months of April, May, and June, 1842, for the purpose of obtaining an appropriation to pay off the arrears due for labor and materials in finishing the building, for which he charged \$207 39.

It is not shown that any law or individual having legal authority authorized him to engage in the business of securing legislation.

This account shows on the face of it that he was not employed in superintending the construction of the custom-house in April and May, for which he has made charge, because he was absent on other and unauthorized business.

This case seems to be one of fact merely. No question of law arises.

Frazee has been paid for all the services which he rendered the United States. His visits to Washington were unauthorized, and were probably for the purpose of obtaining appropriation to pay him for services which he had gratuitously rendered.

There are other causes shown in the report of the committee above referred to and in his own oath (at p. 82) why he did not deserve pay for the time after the 1st of May, 1841, (if not before,) because he most improperly involved the government, against its intention and will, in the most extravagant expenditures, which were deemed so grossly wrong as to induce Congress, at a heavy expense, to investigate the matter.

The present solicitor has not felt at liberty to search for and introduce new evidence, as the case has been heretofore argued and submitted; but he submits that there is abundance to show that Frazee had no legal claim on the government.

R. H. GILLET,
Solicitor.

Dated December 13, 1859.

IN THE COURT OF CLAIMS.

JUNE 1, 1859.

JNO. FRAZEE'S ADMINISTRATRIX *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner makes in her petition the following averments :

1. That on the 23d day of July, A. D. 1835, her intestate, with the approbation of the Treasury Department, was appointed architect and superintendent of the New York custom-house, at a salary of *seven dollars per day*, his travelling expenses on the business of his office to be paid, and an assistant or draughtsman to be allowed him, at *three dollars per day*.

2. That in May, A. D. 1837, the commissioners, with the approbation of the Secretary of the Treasury, increased the decedent's pay to *nine dollars per day*, but withholding the allowance for his travelling expenses.

3. That a difference having arisen between the decedent and Walter Bowne, one of the commissioners, concerning the manner and style of finishing the interior and the furniture for the custom-house, a paper, of which the following is a copy, was delivered to the decedent :

"Resolved, That the services of the superintendent and architect be dispensed with from and after the 5th December, 1840, and that his pay cease from that date.

"WALTER BOWNE,

"Commissioner and Agent, New York.

"NEW CUSTOM-HOUSE, November 30, 1840."

4. That it was usual for resolutions relating to the affairs of the building to receive the signature and approval of the advisory commissioner ; but both were withheld by Mr. Hoyt, the collector and associate commissioner, who disapproved of the dismissal of the decedent.

5. That the whole matter was submitted to the Secretary of the Treasury, who referred it to the naval officer and the surveyor of the customs at New York.

6. That, upon the report of the deputy naval officer and the surveyor of the customs, the Secretary of the Treasury, on the 3d day of March, A. D. 1841, directed that the decedent should be "continued" in the situation of architect and superintendent until the completion of the building, and that his plans and designs for finishing the interior and for the furniture should be carried into effect.

7. That the decedent, by the advice and at the request of Mr. Hoyt, notwithstanding Mr. Bowne's resolution of dismissal, continued to attend daily, as usual, at the building and to advise the workmen employed there, until he received the Secretary's letter continuing his services, and by virtue of which he resumed the full discharge of his duties as superintendent and architect.

8. That from the 3d day of March, A. D. 1841, till the 21st day of May, A. D. 1842, when the work was finished, the decedent, with the

full approbation and concurrence of the collector and the Treasury Department, performed the duties of architect and superintendent.

9. That during the period just mentioned, as well as before, the decedent made, at the request of the collector and the other government officers in charge of the work, various journeys to Washington, at his own expense, to explain the progress of the work and the amount and character of the appropriations required, so as to obtain such appropriations from Congress, and that he charged the expenses to the government.

The petitioner claims—

For the services of her intestate as architect and superintendent of the New York custom-house from the 5th day of December, A. D. 1840, to the 21st day of May, A. D. 1842, 456 days, at \$9 per day.....	\$4,104 00
For expenses to Washington in April, May, and June, A. D. 1842, to obtain an appropriation, &c.....	207 39
Making an aggregate of.....	4,311 39
From which she deducts for sundry articles made for the decedent at the building.....	\$39 00
And cash on account.....	522 00
	561 00

Making the balance now claimed..... 3,750 00
with interest thereon from the 21st day of May, A. D. 1842.

1. As to the first averment:

This averment is undisputed. It is also sufficiently established by the evidence.

2. As to the second averment:

Walter Bowne, Daniel Jackson, and Benjamin Ringgold, commissioners, by a letter to the Secretary of the Treasury, dated May 19, A. D. 1837, recommended that two dollars per day be added to the seven dollars per day then allowed him: provided that no charge should be made by him for aid to draw or copy plans or specifications, or for expenses in visiting the quarry or other places where persons were at work for the new custom-house building. The Secretary of the Treasury, by a letter to the same commissioners, dated May 24, A. D. 1837, authorized "an increase of two dollars per day to his present compensation as architect and superintendent to the new custom-house building, and with the understanding that he is to discharge the duties assigned to a clerk heretofore allowed him."

3. As to the third averment:

This averment is not proved as made; but it sufficiently appears from the evidence that Mr. Bowne did some act which amounted to a dismissal of the decedent, so far as he had authority to dismiss him.

4. As to the fourth averment:

It does not appear from the evidence what was the practice of the commissioners in relation to the discharge of their duties, or what their duties were, or with what powers they were clothed. But it does appear from the evidence that Mr. Hoyt, the collector and *ex-officio*

commissioner, did not approve of the dismissal of the decedent by Mr. Bowne. (See Mr. Hoyt's deposition.)

5. As to the fifth averment:

This averment is sustained by the evidence. (See the letter of the Secretary of the Treasury to Mr. Bowne, dated March 3, A. D. 1841, and the report of the deputy naval officer and the surveyor, dated February 24, A. D. 1841.)

6. As to the sixth averment:

The Secretary of the Treasury, in a letter to Walter Bowne, commissioner, &c., dated March 3, A. D. 1841, said: "The department having called upon the deputy naval officer and surveyor at New York to report their joint views in regard to the difference of opinion existing between yourself and Mr. Hoyt respecting certain matters connected with the new custom-house building, they have accordingly complied with my request.

"In accordance with their recommendation, I deem it proper to authorize Mr. John Frazee to be continued in the situation of superintendent and architect of the building from the date of the passage of the general appropriation bill until the custom-house and the furnishing of the respective rooms shall have been completed; and it is desirable that Mr. Frazee's plans for the interior arrangement of the building should be carried into effect, so far as regards the arrangement of the fly-doors, furniture, and painting of the iron work."

7. As to the seventh averment:

Mr. Hoyt in his deposition states as follows:

"When I went into office Mr. Frazee was occupied as architect and superintendent of the custom-house, and he had been so for a long time previous thereto. He continued to act in that capacity until the building was completed, with the reservation hereafter to be mentioned, that is to say: some time in the beginning of December, 1840, Mr. Walter Bowne, the chief commissioner, without consulting or advising with the deponent, took upon himself the responsibility of dismissing Mr. Frazee from the station referred to, Mr. Bowne assuming that the custom-house was finished. Deponent was informed of that proceeding by Mr. Frazee, when deponent advised Mr. Frazee to remain in the building as usual until deponent could make a report to Mr. Woodbury, then Secretary of the Treasury, and obtain his directions thereon. Mr. Bowne and deponent were so far apart in their views upon the question that the Secretary referred the matter, as the deponent is informed, to the naval officer and surveyor of the port, to report upon the difference of opinion that existed between Mr. Bowne and deponent. Those officers made their report to the Secretary, confirming the views of the deponent, as deponent thinks. Whereupon the Secretary of the Treasury directed that Mr. Frazee be continued as architect and superintendent; and he did so continue until it was conceded that the custom-house was completed by the Treasury Department. Deponent, on one occasion, and deponent thinks in March, 1844, when the subject was more fresh in the mind of deponent than it could be at present, wrote a letter to Mr. Frazee on the subject, the draught of which letter was destroyed by fire at the office of deponent some three or four years

since ; but if the petitioner should have the original letter, as engrossed, deponent would prefer that it should be attached to this deposition."

There is on file in this case a paper purporting to be a letter from Mr. Hoyt to Mr. John Frazee, dated March 6, A. D. 1840 ; but it is not annexed to Mr. Hoyt's deposition, nor is it otherwise authenticated. In that paper is the following statement: "I wrote to the Secretary under the idea that he would interfere in a matter about which there was a difference of opinion between Mr. Bowne and myself, and therefore I recommended that you should remain at the building and see that nothing was done inconsistent with the general plan which had been adopted for its construction until the Secretary should decide upon the points upon which Mr. Bowne and myself differed ; and you adopted my advice, and did remain until the Secretary did order you to be continued, which I considered at the time as a decision on his part that you had not been dismissed according to the appropriate forms."

8. As to the eighth averment :

Stephen C. Duryea testifies that he knows of the decedent's being employed as architect and superintendent of the New York custom-house in 1840, and some time earlier, and until the spring of 1842—the early part of the spring.

R. E. Lannitz testifies as follows : "I knew Mr. Frazee was engaged as architect and superintendent of the custom-house while it was being constructed. He commenced under his first appointment in the year 1836. I know the date from having been at that time, and for a few months after, his partner. He continued in the work until December, 1840, when he was discharged by Mr. Bowne. After that, about the 3d of March, 1841, he was reappointed by the Secretary of the Treasury, and continued to act as superintendent until the building was finished and taken possession of by the government, which was in the summer of 1842. He also designed all the fixtures, railings," &c.

In a statement made by Mr. Edward Curtis, dated March 7, A. D. 1844, which the solicitor has admitted in evidence, Mr. Curtis states as follows : "I have read Mr. Frazee's memorial. To the best of my recollection he has truly stated the conversation which passed between him and myself when I entered upon the duties of the office of collector in March, 1841."

That part of the decedent's memorial to which Mr. Curtis refers in his statement is as follows :

"On the 23d March, 1841, Mr. Curtis succeeded to the collectorship of the port of New York, and soon after requested an interview with your memorialist ; it took place, and then and subsequently the collector expressed a strong desire to hasten the completion of the building and fit it for occupancy with the least delay. The buildings then occupied by the custom-house were not only inconvenient but insecure, and the public records were not safe there. Your memorialist was asked when the new building could be completed and furnished, and if it could not be rendered habitable by August then next, and also if he could not consent to lessen his compensation for the few intervening months. In reply, a strong doubt was expressed of the possibility of

finishing and furnishing the building by August ; and as to compensation, your memorialist, among other things, alluded to the suspension of his pay in consequence of the course pursued by Mr. Bowne, and said and consented, in case he received his back pay, to render his services gratuitously until the completion *as fixed* by the collector. This, in truth, was the *spirit*, if not the letter, of his consent to serve gratuitously. But the contingency upon which this consent rested never happened ; the building was not finished in August, 1841 ; nor has your memorialist to this hour received his back pay. Besides, your memorialist has reason to believe that the collector soon after communicated to the Treasury Department this consent to serve gratuitously, and that no instructions on the subject have ever been given, nor has the receipt of it ever been acknowledged by the Secretary of the Treasury."

Mr. Curtis, in his statement already noticed, also said :

"I was not a commissioner for the superintendence of the construction of the new custom-house, and neither had nor professed to have any power or responsibility in respect to its construction, nor in regard to the terms or compensation of Mr. Frazee as its architect. His commission was from the Department of the Treasury, and I mentioned in one of my letters to Dr. Ewing what had been said by Mr. Frazee, but I received no authority to make any new arrangements touching his terms or his compensation, and no notice was taken by the department of what I communicated."

Mr. Edward Curtis, in a letter to the Secretary of the Treasury, dated March 25, A. D., 1841, said :

"Mr. Bowne, I am told, claims heavy compensation from the United States for his services, and, to save further expense, he ought to be dismissed and required to render his account."

"Charles A. Davis, esq., of the firm of Davis, Brooks & Co., merchants of high standing, has consented, at my request, to act as commissioner in the place of Mr. Bowne *without compensation*."

"Mr. Frazee, the architect, has agreed with me, in case Mr. Bowne be removed, to serve *for nothing* from and after the first day of May next. I enclose his note to me making that offer."

The decedent, John Frazee, in a letter to Mr. Edward Curtis dated March 23, A. D. 1841, said :

"To convince you that I am desirous to give my support to a judicious economy with the public treasure, I will, from and after the first day of May next, render my services upon the building as superintendent and architect until every part of the work shall be completed without charge or compensation."

The Secretary of the Treasury, in a letter to Walter Bowne, dated April 12, A. D. 1841, said :

"The department having appointed George F. Tallman, esq., of New York, commissioner and disbursing agent for the new custom-house, you are consequently relieved from the future discharge of those duties."

The deputy naval officer and the surveyor, in their report dated February 26, A. D. 1841, said :

"The pay list of the workmen, as we have seen, shows that at the

time Mr. Frazee was dismissed, December 5, 1840, there were upwards of thirty workmen engaged upon the building, and that nearly the same number were continued upon the work for several weeks afterwards ; and, as has already been stated, a number of workmen are still employed upon the building. Thus it appears that during a period of nearly two months this important edifice has been progressing towards completion without the superintendence of any person properly qualified to direct the workmen in the various and difficult branches in which they were engaged. In view of these facts and considerations, we feel constrained to regard the resolution of Mr. Bowne dismissing the architect and superintendent without cause or provocation as an act of gross injustice to one of the first artists of the age, as well as detrimental to the public interests. And as there appears to be much work still to be done upon the building which requires the professional skill and superintending services of Mr. Frazee, we would recommend that he be immediately reinstated. We would also most respectfully beg leave to state it here, as our deliberate opinion, that justice cannot be done Mr. Frazee without allowing him his usual compensation during the whole interval of time since his dismissal on the 5th of December, 1840, he having been improperly dismissed without cause, and thereby unexpectedly thrown out of employment, greatly prejudicial to his interests."

9. As to the ninth averment:

Stephen C. Duryea testifies that he recollects of the decedent's going twice to Washington on business of the custom-house. He can not specify how many times more.

R. E. Lannitz testifies that he knows that the decedent had to go on the business of the custom-house to Washington several times. He cannot tell by what authority, nor how long he remained there.

Mr. Hoyt testifies that the decedent made several journeys to Washington on the business of the commission during the progress of the work ; that the expense at that day was about thirty dollars.

In the paper purporting to be a letter from Mr. Hoyt to the decedent, already noticed, there is the following statement:

"In regard to your visits to Washington on business relating to the new custom-house, to explain in reference to appropriations asked for, I know that you did so visit Washington, and I am under the impression it was at the suggestion of the Secretary, but certainly at the request of the commissioners of the custom-house, and I have no doubt your expenses were paid and charged to construction, as I think it was a fair charge. The appropriations were large and more than was originally contemplated, and it was very proper to ask for and equally proper to explain the causes for the excess, which it was next to impossible to explain by letter."

Mr. Curtis, in his statement, says: "In the spring of 1842, Mr. Frazee frequently spoke to me of the trouble that existed from the want of means to pay the workmen employed on the building, and others who had claims for materials furnished. There was no acting commissioner. On several former occasions, in previous years, the work on the building had been ahead of the appropriations, and the commissioners had sent Mr. F. to Washington to make the necessary

explanations and aid in obtaining the requisite appropriations. I advised him to go to Washington, as he had been on former occasions, and explain to the department and Congress the state of the accounts, show what and how much was due, and, by application to the Treasury Department and to Congress, to do what he could to obtain the means to pay off the arrears to laborers and others having just claims. In accordance with this advice, Mr. Frazee went to Washington in May or June, 1842."

The facts of this case seem to us to be as follows :

John Frazee was employed by proper authority as the architect and superintendent of the custom-house in New York, at a compensation of *nine dollars* a day. On the 5th day of December, A. D. 1840, he was dismissed from that employment, and on the 3d day of March, A. D. 1841, he was reinstated in it. He continued to perform the duties of architect and superintendent from the day last mentioned till the completion of the custom-house, some time in the spring or summer of the year 1842. The precise time when the custom-house was finished being uncertain, Mr. Duryea stating it to be early in the spring and Mr. Lannitz in the summer of the year 1842, we have adopted the day stated by the decedent on oath, first, because it is so stated, and second, because it is about intermediate between the period stated by Mr. Duryea and that stated by Mr. Lannitz.

The petitioner claims that the decedent was entitled to compensation from the 5th day of December, A. D. 1840, till the 3d day of March, A. D. 1841, as well as afterwards ; but our opinion is that he did not, during that interval, perform the duties of architect and superintendent. This is obvious from the report of the deputy naval officer and surveyor.

On the other hand, it is objected that after the 1st day of May, A. D. 1841, the decedent served gratuitously. It is plain that he made an offer to do so, but it seems to us to be equally plain that his offer was never accepted. Moreover, the just inference from the evidence is, that if it had been accepted, then, upon an arrangement for that purpose being formally made, two conditions would have been annexed : first, that his pay from December 5, A. D. 1840, till March 3, A. D. 1841, should have been made good to him ; and second, that the work should be completed on or before the 1st day of August, A. D. 1841. Our opinion is that there never was any definite and binding arrangement for him to serve gratuitously. The Secretary of the Treasury took no notice of the offer made by him for this purpose. In this respect he acted wisely. If the United States needed the services of the decedent, justice, as well as public policy, required that they should make him a fair and reasonable compensation therefor. If they did not need his services, then he ought not to have been employed.

Our opinion is that the decedent was entitled to compensation, at the rate of \$9 a day, from the 3d day of March, A. D. 1841, till the 21st day of May, A. D. 1842, subject to a deduction of \$522, the amount found due by the select committee, under the act of Congress approved May 18, A. D. 1842, (5 Stat. at L., p. 485, ch. 29, No. 179,)

and of \$39 for articles made for the decedent at the custom-house, to wit:

For <i>three hundred and eighty-one days</i> , at \$9 a day.....	\$3,429 00
Subject to a deduction of the aggregate of the two sums just mentioned.....	561 00
Leaving a balance of.....	2,868 00

Our opinion further is, that the decedent was not entitled to compensation for his journeys and attendance at Washington in the year 1842.

We shall report to Congress a bill in favor of the petitioner for the sum of two thousand eight hundred and sixty-eight dollars.

REPORT

OF THE COURT OF CLAIMS

IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES

REPORT

TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES

IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES

REPORT

1. The petition of the claimant.
2. The report of the committee on the petition.
3. The report of the committee on the petition.
4. The report of the committee on the petition.
5. The report of the committee on the petition.
6. The report of the committee on the petition.
7. The report of the committee on the petition.
8. The report of the committee on the petition.
9. The report of the committee on the petition.
10. The report of the committee on the petition.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Washington, this 24th day of December, A. D. 1854.

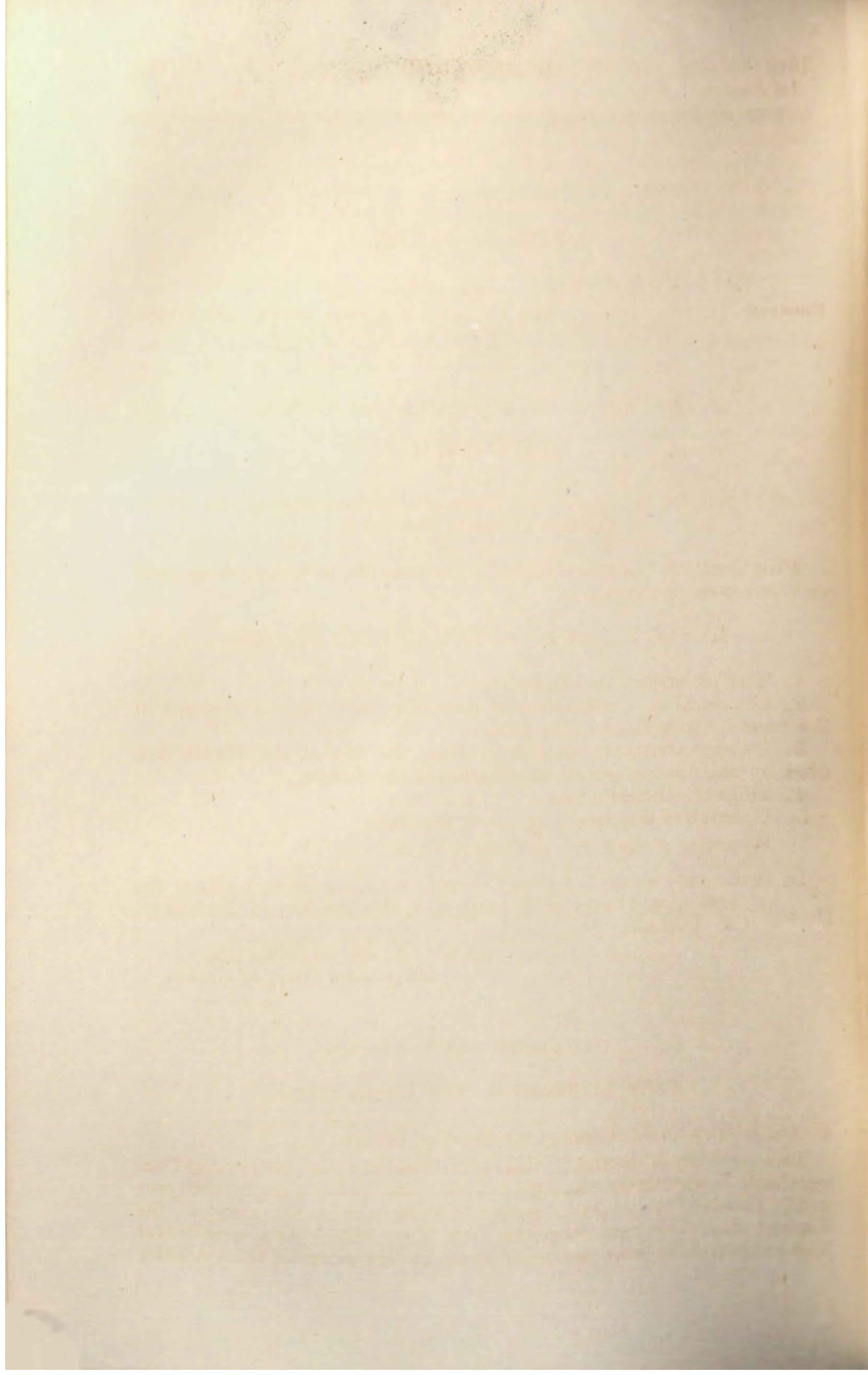
BARTLETT HUNTINGTON

Chief Clerk of Court

UNITED STATES COURT OF CLAIMS

BARTLETT HUNTINGTON

To the Honorable the Judges of the Court of Claims
The petition of Bartlett Huntington, of the State of New York, respectfully sheweth: That your petitioner is the son of the late Bartlett Huntington, who died on the 24th day of December, 1854, and was a resident of the State of New York at the time of his death. That your petitioner is the sole and lawful heir of the said late Bartlett Huntington, and is entitled to the same as such heir. That your petitioner is now residing in the State of New York, and is a resident of the same at the time of filing this petition. That your petitioner is now residing in the State of New York, and is a resident of the same at the time of filing this petition.



RUFUS L. BAKER.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

RUFUS L. BAKER *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's commissions and documents admitted as evidence in the cause, transmitted to the Senate.
3. Other documents withdrawn from the files of the Senate and filed by claimant in cause, transmitted to the Senate.
4. Deputy solicitor's brief.
5. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said court, at Washington, this 5th day of December,
A D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

RUFUS L. BAKER *vs.* THE UNITED STATES.

To the honorable the judges of the Court of Claims:

The petition of Rufus L. Baker, of Windham, in the State of Connecticut, respectfully sheweth: That your petitioner, in the year 1827, received a brevet of major of ordnance in the army of the United States, to rank from the 24th May, 1827. That said brevet was conferred on your petitioner under and by virtue of the authority

conferred by the 4th section of an act of Congress approved on the 6th day of July, 1812, entitled "An act making further provision for the army of the United States, and for other purposes," (2 Stat. at Large, 785,) by which section it is enacted: "That the President is hereby authorized to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions or meritorious conduct, or who shall have served ten years in any one grade: *Provided*, That nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emolument, except when commanding separate posts, districts, or detachments, when they shall be entitled to and receive the same pay and emoluments to which officers of the same are now or may hereafter be allowed by law."

The act of Congress of the 16th April, 1818, entitled "An act regulating the pay and emoluments of brevet officers," (3 Stat., 427,) enacts: "That the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank *when on duty and having a command according to their brevet rank, and at no other time.*"

Your petitioner further shows that he held the said rank of brevet major of ordnance from the said 24th May, 1827, to the 6th July, 1838, when he was promoted to a majority; that during all said time subsequent to the 1st May, 1828, he was in command of the arsenal at Allegheny county, in the State of Pennsylvania, which was an arsenal of construction, and one of the principal arsenals of construction in the United States; that during said period, the average number of men under his command was equal to that of a major in the line; that during said period the public property in his hands amounted to a million and a half of dollars, and the disbursements in a single year, during said period, exceeded \$100,000; and from the importance of the works, the number of men employed, the responsibilities of the station, and the experience required for the discharge of the duties of the post, the command was one in all respects equal to the rank of major.

Your petitioner would further show that in the discharge of the duties of his office, he was compelled, during a portion of said period, to use his own horses, and that he employed and paid from his private funds the number of servants allowed to a major.

During said period he claimed the said compensation, but the same was refused, until allowance was made for a portion of said period by Mr. Poinsett, Secretary of War, from the 1st November, 1834, to the 6th July, 1838, the grounds of which allowance are shown by the following communication from Mr. Poinsett:

"WAR DEPARTMENT, *January 22, 1838.*

"The principle upon which the claim of Brevet Major Baker, of the ordnance corps, for an allowance of the pay and emoluments of his brevet rank, was sanctioned by this department, is founded upon the act of Congress of April 16, 1818, which enacts that the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty and having a command according to their brevet rank, and at no other

time. It appears that the command held by Major Baker from the year 1828 to the present time is one of the first importance in his corps, and fully equal, in its numerical force and responsibilities, to the command of a major of ordnance; and, accordingly, this department sanctioned his application for the pay and allowances of his brevet rank from the 1st day of August, 1837, but deemed it proper that a retrospective allowance, involving an amount not included in previous estimates and appropriation, should receive a legal sanction.

“J. R. POINSETT.”

And the nature of the service of your petitioner is shown by the following communication from Colonel Bomford, the chief of the Ordnance department:

“ORDNANCE OFFICE,
“*Washington, February 1, 1838.*”

“SIR: It appears from the records of the office that the number of officers and men composing your command at the Allegheny arsenal, during the several years herein stated, was as follows:

“In the year 1828, 62; in the year 1829, 83; in the year 1830, 61; in the year 1831, 47; in the year 1832, 50; in the year 1833, 55; in the year 1834, 55; in the year 1835, 61; in the year 1836, 117; in the year 1837, 145; and that a number, estimated at the lowest at *thirty* men, and not included in the foregoing reports to this office, were likewise attached to your command during the years 1830, 1831, 1832, 1833, 1834, and 1835, thus augmenting your command during the whole time to a force exceeding the command of a captain. The foregoing numbers vary in some respects from those stated in my letter to the Secretary of War of January 2 last, owing to the omission in that letter of the officers of your command.

“Very respectfully, sir, your obedient servant,

“G. BOMFORD,
“*Colonel of Ordnance.*”

“Major R. L. BAKER.”

“ORDNANCE OFFICE,
“*Washington, January 2, 1838.*”

“SIR: A letter has been received from Major Baker, in which he requested this department to state the nature of his duties and command between April, 1828, and the 1st August, 1837. Agreeably to his request, I have the honor to state that his duties have been very arduous and generally the same during the period alluded to; that the number of men of his command varied at different periods as the exigencies of the service required; for instance, in 1828 he commanded an average number of 57 men; in 1829, an average number of 78; in 1837, an average number of 141. During the present year, the average may be near those in the preceding year; but the responsibility attached to his command, which is great, may be said to have been nearly the same from 1828 to 1837.

“I have the honor to be your obedient servant,

“G. BOMFORD, *Colonel of Ordnance.*”

“Hon. J. R. POINSETT, *Secretary of War.*”

Your petitioner, therefore, claims that the opinion of the officer in command of his corps, and the decision of the Secretary of War, as well as the nature and character of the services themselves, present the strongest and most conclusive evidence of the nature of his command; and that he is entitled by law to the pay and emoluments of a major of ordnance from the 1st May, 1828, to the 31st October, 1834, payment from the latter date to July 7, 1838, the date of his promotion, having been made by order of the Secretary of War.

The following has been the action of Congress on this claim:

During the second session of the 25th and 26th Congresses the petition was presented to the Senate and referred to the Committee on Military Affairs, who were discharged. During the 2d session of the 30th Congress the Committee on Military Affairs reported a joint resolution, which passed the Senate, and in the House of Representatives was reported upon favorably by the Committee on Military Affairs, referred to the Committee of the Whole House, but was not reached in the order of business.

R. L. BAKER, [L. S.]
Late Lieutenant Colonel of Ordnance.

Witness: CHAS. FITCH.

WINDHAM, WINDHAM COUNTY, STATE OF CONNECTICUT,
February 19, A. D. 1856.

Personally appeared before me Rufus L. Baker, signer of the foregoing petition, and made oath that he believes all the facts set forth in said petition to be true.

Before me.

CHAS. FITCH,
Justice of the Peace.

IN THE COURT OF CLAIMS.—No 507.

RUFUS L. BAKER *vs.* THE UNITED STATES.

Brief of the Deputy Solicitor for the United States.

This is a claim for brevet pay.

The petitioner held, during the whole or the greater part of the period embraced by this claim, two commissions, by one of which the President did *appoint him captain of ordnance in the service of the United States*, and by the other did *confer on him the rank of major by brevet in the army of the United States*.—(See copies of his commissions.)

The act "regulating the pay and emoluments of brevet officers," approved April 16, 1818, enacts "that officers of the army who have brevet commissions shall be entitled to and receive the pay and emolument of their brevet rank when on duty and having a command according to their brevet rank, and at no other time."

The petitioner alleges that he was on duty and had a command according to his brevet rank from the 1st of May, 1828, to the 31st of October, 1834; that during this period he (Baker) was not permitted to receive the pay of his brevet rank.

The command held by the petitioner during the period in question was that of Allegheny arsenal, a military establishment belonging to the Ordnance department, and at which there were employed during the period charged for a number of men, varying from 62 to 83, some of whom may have been enlisted men, and others were ordinary hired men, employed by the day or month under contract.—(Report of Ordnance department, December 12, 1857.)

For the United States it is contended that in order to entitle the petitioner to recover he must have fulfilled two conditions under the act of 1818:

- 1st. He must have been on duty according to his brevet rank; and,
- 2d. He must have had a command according to his brevet rank.

And it is also contended that he fulfilled neither of these conditions.

Of rank as distinguished from office.

In the military establishment officers generally, but not always, have rank.

Military storekeepers (keepers of military stores) are commissioned officers, and form part of the military establishment, (act March 2, 1821, chap. 13, sec. 9, 3 Stat., 615,) and are amenable to the rules and articles of war, (art 36,) yet have no rank. Paymasters in the army were without rank until it was conferred upon them by the act of March 3, 1847, chap. 61, sec. 13, (9 Stat., 184;) and medical officers first received rank by the act of February 1, 1847, chap. 8, sec. 8, (9 Stat., 123.)

Rank is generally annexed to the office. The adjutant general, commissary general, paymaster general, and surveyor general have the rank of colonel; the quartermaster general has the rank of brigadier general. But rank may depend upon the duties performed, as under the act of March 3, 1813, chap. 52, secs. 1 and 2, (2 Stat., 819,) eight quartermaster generals were appointed, of whom the one "attached to the principal army" was to rank as a brigadier general, the others as colonels.

This distinction is presented by the two commissions in this case: the one *appoints*; the other *confers rank*.

Of brevet rank as distinguished from other rank.

The army of the United States consists of a fixed number of officers and men constituting an organization, which will be found detailed in every annual army register.

The number of these officers cannot be increased without law; each holds an office, and his commission expresses the office which he holds.

To each of these offices is generally attached a certain rank, sometimes expressed in the title of the office, as colonel of the engineers;

and sometimes separately given by law, as adjutant general with the rank of colonel.—(Act of March 2, 1821, sec. 6, 3 Stat., 615.)

Besides the commissions which confer offices, with the rank attached thereto, the President can confer upon such officers additional commissions which confer rank only. Such additional commissions are styled brevet commissions. Thus, the late Adjutant General Jones held the office of adjutant general with the rank of colonel, in his own department, attached thereto, and at the same time he held by brevet the rank of major general in the army.

These brevet commissions are not limited in number by law, as are those commissions which confer places in the organization of the army; but may be multiplied to any extent by the joint action of the President and the Senate under the acts of July 6, 1812, chap. 137, sec. 4, (2 Stat., 784,) and April 16, 1818, chap. 64, sec. 2, (3 Stat., 427.)

A brevet commission is a commission "in the army," not in any particular regiment or corps of the army. All brevet commissions are of the same tenor. A captain of ordnance, a captain of engineers, a captain of infantry, and a captain of cavalry, if commissioned majors by brevet, receive the same commission—that of "major by brevet in the army of the United States." Their brevet commissions neither recognize, nor confirm, nor create any difference between them on account of their previous rank. By brevet they are all majors and majors only.

That brevet rank is army rank, as distinguished from rank in regiments or corps, is well illustrated by a comparison of art. 24, sec. 13, and art. 2, sec. 14, of the articles of war adopted by the continental Congress, September 20, 1776.—(1 Journals, 489.) The first cited article, speaking of rank, directs that officers having brevets take place on courts-martial composed of different corps according to their brevets. The last cited article, speaking of courts-martial, directs that officers of different corps on courts-martial take the same rank which they hold *in the army*. Both provisions apply to the same state of facts, and are necessarily intended to be the same in sense; and the phrase *rank in the army*, used in the last, includes *brevet rank* as used in the first.

Of the incidents of brevet and other rank.

1st. *As to command*.—The commission by which an officer holds a place or "is mustered" in his own corps gives him, by its terms, the right to command in that corps; out of the corps his rights are defined by statutes—that is to say, by the 62d article of war as enacted in "An act for establishing rules and articles for the government of the armies of the United States," approved April 10, 1806, (2 Stat., 359,) which is in the following words:

"ART. 62. If upon marches, guards, or in quarters, different corps of the army shall happen to join and do duty together, the officer highest in rank in the line of the army, marine corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise

specially directed by the President of the United States, according to the nature of the case."

A brevet commission entitles an officer to precedence and command in certain cases prescribed by one of the articles of war, which is in the following words:

"ART. 61. Officers having brevets or commissions of a prior date to those of the regiment in which they serve may take place in courts-martial, and on detachments, where composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such officers belong, they shall do duty and take ranks, both in courts-martial and on detachments, which shall be composed of their own corps, according to the commissions by which they are mustered in the said corps."

In art. 3, p. 16, of the edition of Army Regulations, revised by General Scott and published by the War Department in 1825, is found the following construction of this article:

"18. The terms regiment and corps, as used in the 61st article of war, will be considered as synonymous."—(Decision of the President of the U. S., announced in orders, July 1, 1816.)

A brevet commission also renders an officer eligible, by the assignment of the President, to exercise command over permanently constituted bodies of troops, to the same extent as if such bodies were "detachments" within the above cited articles of war. Thus, General Jesup being quartermaster general with the rank of brigadier general, and not as such invested with the command of troops, yet having a brevet commission as major general, commanded as major general, by assignment of the President, a separate army in Florida.

2d. *As to pay.*—A brevet commission does not of itself entitle an officer holding it to pay. It might and probably would be otherwise if the brevet commission conferred an office instead of rank merely.

The absence of pay was formerly so prominent a characteristic of brevet rank that in James' Military Dictionary, the best extant, it is made the distinguishing ground of his definition, as follows:

"*Brevet rank* is a rank in the army higher than that for which pay is received. It gives precedence (where corps are brigaded) according to the date of the brevet commission.

"*The brevet*, a term used to express general promotion, by which a given number of officers are raised, from the rank of captain upwards, without any additional pay, until they reach the rank of major general, when, by a late regulation, they become entitled to a quarterly allowance."—(Edition of 1816.)

I find no act earlier than that of July 6, 1812, (2 Stat., 784,) giving brevet pay. So far as I can learn from the journals of the continental Congress, by the aid of the index, brevet pay was allowed only in exceptional cases, and brevets seem to have been conferred simply as honorable marks of distinction, as appears from the following resolutions, which are all that are pointed out in the index:

Resolution of April 30, 1778, (2 Journal, 532,) providing that brevets shall give no rank in the regiment, troop, or company, but only

on detachments and courts-martial ; nor shall they entitle officers to additional pay.

Resolution of January 13, 1779, (3 Journal, 182,) giving brevet rank to French volunteers about to return to France.

Resolution of February 13, 1779, (3 Journal, 200,) to the same effect.

Resolution of September 10, 1783, (4 Journal, 260,) informing the paymaster general that brevet commissions do not entitle to pay or emoluments, unless the same be expressed in the resolution granting such commissions.

For pay, then, brevet officers must look to statutory provisions and army regulations in accordance therewith.

Of the statutes granting brevet pay and regulations auxiliary thereto.

The provision, act of July 6, 1812, chapter 137, sec. 4, (2 Stat., 784,) respecting brevet pay is as follows: "Nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to and receive the same pay and emoluments to which officers of the same grades are now or hereafter may be allowed by law."

The provision in the act of April 16, 1818, chap. 64, sec. 1, (3 Stat. 427,) is as follows:

"The officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty and having a command according to their brevet rank, and at no other time."

The following regulations have been issued from time to time by the President to give effect to the act of 1818, and are all that are found in the successive editions of General Regulations for the Army.

The first is taken from the edition of Army Regulations promulgated in 1820, page 125, but was made, as the date attached to it shows, immediately after the passage of the act in 1818.

[May 8, 1818. "Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank; for example, a brevet captain must command a company; a brevet major and a brevet lieutenant colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier general, a brigade; a brevet major general, a division."]

In the regulations of 1821 the same order, in the same words, is found in par. 18 of art 71.

In the regulations of 1825 (revised by Major General Scott) the provision on this subject is found in article 71, as follows:

"1124. Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank; for example, a brevet captain must command a company; a brevet major and a brevet lieutenant colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier general, a brigade; a brevet major general, a division."

In the edition of 1834 the regulation is as follows:

“Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments when on duty under the following circumstances: a brevet captain when commanding a company; a brevet major when commanding two companies or when acting as major of the regiment; a brevet lieutenant colonel when commanding at least four companies or when acting as lieutenant colonel of the regiment; a brevet colonel when commanding nine companies of artillery or ten of infantry or dragoons, or a mixed corps of ten companies, or when commanding a regiment; a brevet brigadier general when commanding a brigade of not less than two regiments or twenty companies; a brevet major general when commanding a division of four regiments or at least forty companies; a brevet officer when assigned to a particular duty or command according to his brevet rank, although such command be not in the line, provided his brevet allowances are recognized in the order of assignment.”

“To entitle officers to brevet allowances while acting as field officers of regiments according to their brevets, they must be recognized at general headquarters as being on such duty, and the fact announced accordingly in general orders.”

In the edition of 1835 (p. 194) the regulation is identical with that just cited.

In the edition of 1841 the regulation is as follows:

“1255. Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments, when *on duty and having a command* according to their brevet rank, as follows:

“1. A brevet captain, when commanding a company.

“2. A brevet major, when commanding two companies or when on duty as major of the regiment.

“3. A brevet lieutenant colonel, when commanding at least four companies or when on duty as lieutenant colonel of the regiment.

“4. A brevet colonel, when commanding a regiment or at least two companies.

“5. A brevet brigadier general, when commanding a brigade of not less than two regiments or twenty companies.

“6. A brevet major general, when commanding a division of four regiments or at least forty companies.

“7. A *brevet* officer when assigned by the special order of the Secretary of War to a particular duty and command according to his brevet rank, although such command be not in the line: *provided* his brevet allowances are recognized in the order of assignment.

“1256. To entitle officers to *brevet* allowances while acting as field officers of regiments, according to their brevets, they must be recognized at general headquarters as being on such duty, and the fact announced accordingly in general orders.”

In the last edition of regulations, issued January 1, 1857, the department gives a construction to the act of 1818, by par. 1176 and 1177, in the following words:

“1176. Officers are *on duty and have a command according to their brevet rank* only when assigned to their brevet rank by the President, with the appropriate actual command composed of different corps, or when serving on detachments composed of different corps with such

appropriate command. But in the regiment, troop, or company to which officers belong, they do duty and draw pay according to the commissions by which they are mustered in their own corps.

“ 1177. The following are the appropriate commands to each grade :

“ For a captain, at least a company.

“ For a major, at least 2 companies.

“ For a lieutenant colonel, at least 4 companies.

“ For a colonel, at least 1 regiment or 10 companies.

“ For a brigadier general, at least 2 regiments or 20 companies.

“ For a major general, at least 4 regiments or 40 companies.

“ For a lieutenant general, at least 8 regiments or 80 companies.”

Of the construction of the act of 1818.

The early regulations in the foregoing series are often referred to as giving a construction to the act of 1818, and giving it a construction opposed to that for which I contend in this case.

The regulations in question may indicate the views of the then executive as to the construction of the statute, and may even in form seem to give it a construction, but such was not their purpose.

“ The purpose of these regulations,” [of 1818 and 1820,] says Mr. Attorney General Wirt, (1 Opinions, 549,) “ then is merely to supply what positive legislation had wholly omitted, not to contradict it in anything which it had enacted.”

The statutes had already designated the cases in which brevet officers would be on duty according to their brevet rank, but no statute had determined their commands. This was to be determined by regulations.

When then the regulations speak only of certain commands necessary to entitle officers to brevet pay, we are not to understand that no other condition is to be fulfilled.

I am not aware that the point which I shall make has ever been expressly decided by the department. I cannot find that it has been. But even if the executive department had so decided, and if the decision had been acted upon ever since the passage of the act, that fact should not be suffered to control the judgment of this court. Upon this point I rely upon the following language of the Supreme Court in *The United States vs. Freeman*, (3 How., 564,) in regard to claims for brevet pay under the act of 1818, and in which the construction which had been given by the executive departments to the act of 1818, from its passage down to the year 1846, was reversed. The court said: “ Though what has been differently done is binding upon the government and cannot be recalled to the pecuniary disadvantage of any officer who may have received brevet pay and emoluments not according to the act of 1818, *no erroneous practice under it of however long standing can justify the allowance of a claim contested by government in a suit* contrary to the true meaning and intent of that act.”

And the rule is equally applicable to the other side, for the same court said, in *The United States vs. Dickson*, (15 Peters, 141 :) “

“ The construction given to the laws by any department of the executive government is necessarily *ex parte* without the benefit of an

opposing government in a suit where the very matter is in controversy; and when the construction is once given, there is no opportunity to question or revise it by those who are most interested in it as officers deriving their salary and emoluments therefrom, for they cannot bring the case to the test of a judicial decision. It is only when they are sued by the government for some supposed default or balance that they can assert their rights. Their acquiescence, therefore, is almost from a moral necessity when there is no choice but obedience as a matter of policy or duty. But it is not to be forgotten that ours is a government of laws and not of men; and that the judicial department has imposed upon it, by the Constitution, the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it. The present question, then, must be decided upon the same principles by which we ascertain the interpretation of all other laws: by the intention of the legislature as it is to be deduced from the language and the apparent object of the enactment," (pp. 161, 162.)

The act of 1818 requires that the brevet officer be on duty according to his brevet rank.

The claimant denies that this condition is imposed by the act, and contends that the act requires the brevet officer to be "on duty" simply, without further qualification. He reads the act as requiring that the brevet officer have a command according to his brevet rank, and also that he be on duty.

The answer to this is, that all officers who have a command are on duty; no officer commands who is off duty; and therefore the condition that the officer have a command includes the condition that he be on duty; so that the construction contended for by the claimant makes surplusage of the words "on duty," and allows but one condition where the statute purports to make two. This is contrary to the established rules of construction, and cannot be allowed, if it may be avoided, by any other reasonable construction.

On the other hand, the construction I contend for gives a special effect to the words in question. An officer may be on duty according to his brevet rank and have no command; this is the case when he sits on courts-martial with officers of other corps; he takes place according to his brevet rank under the 61st article of war, but has no command. An officer may have a command according to his brevet rank and not be on duty according to his brevet rank; a major having the brevet rank of colonel may, in the absence of superior officers, command his own regiment; he has a command according to the rank of a colonel, but, being in his own corps under the 61st article of war, must do duty only according to the commission by which he is mustered therein—that of major; he commands the regiment because, as major, he is superior in rank to every other person in it; not because he is doing duty in his rank of colonel.

Each of these conditions applies to a state of facts of frequent occurrence. Brevet officers are daily sitting upon courts-martial com-

posed of officers of different corps ; and brevet officers daily find themselves in commands belonging to the higher officers of their own regiments. Congress may well be supposed to have contemplated this notorious state of facts, and to have intended to deny brevet pay to any officer who fulfilled but one of these conditions, and to give it to those only who fulfilled both. I maintain that Congress has used apt words to express that intention.

Again, the expression used in this act is almost identical in terms, and is identical in sense, with the expression used in the 61st article of war. When, in that article, a captain is directed to "do duty and take rank according to the commission by which he is mustered," no one has ever doubted that the injunction is to do duty *as captain*; that the intent is not simply to command him to do duty, to be busy, not to be idle, but to prescribe the rank in which he shall do duty. The purpose of the article is not to guard against idleness, but to determine rank. So, in the act of 1818, I contend that the same expression is not meant simply to prohibit idle men—men not on duty—from getting brevet pay, but to determine the grade in which they must be serving in order to entitle them to pay.

The petitioner was not on duty according to his brevet rank.

While officers are serving in their own regiments or corps—in which case, under the 61st article of war, they "do duty and take rank * * * according to the commissions by which they are mustered in the said corps"—such officers cannot fulfil the conditions imposed by the act of April 16, 1818.

In other words: the petitioner, while *doing duty and taking rank according to the commission of captain by which he was mustered in the ordnance corps*, could not at the same time be *on duty and having a command according to his brevet rank of major in the army*.

To do duty is to perform certain official acts ; to exercise the functions of an office ; and the acts which the petitioner did by virtue of his commission as captain, he could not have done by virtue of his commission as major.

The petitioner had not a command according to his brevet rank.

The second condition required by the act to entitle an officer to brevet pay is, that he must have had a command according to his brevet rank. The petitioner must show that he had a command according to the brevet rank of major. He shows that he was in command of Allegheny arsenal, and produces written opinions of high officers to the effect that this was equal to the command of a major of ordnance. Among these officers was the Secretary of War, Mr. Poinsett, who allowed him brevet pay for the same species of service from and after the 1st of August, 1837, but, while expressing the opinion that he was equally entitled to it for the preceding period, declined to order payment.

In considering what is the command appropriate to a given rank, we must look beyond the naked rank. Rank alone does not deter-

mine command ; if it did, all officers having the same rank would necessarily have the same appropriate command. But this is not the case. A paymaster has the same *rank* as a major of infantry, and a major of infantry has the same rank as major of engineers ; yet the appropriate command of one of these officers is not that of another. All have the same rank, but have not the same command.

If, then, the act of 1818 means to say that an officer, being by brevet a major, and having a command according to the rank of major, shall be entitled, &c., &c., it contains a latent ambiguity ; for there is no command according to the rank of major *qua major* ; or if there be, it is that of a major of infantry, according to the ruling of the Supreme Court in the case of *Wetmore vs. The United States*, (10 Peters, 647.) In that case, a paymaster being entitled to "the pay and emoluments of major," claimed those of major of cavalry ; but the court said, (p. 655,) "when the law speaks of a *major*, the term is most naturally considered as having been used in reference to such officers of that rank, and of such regiments, actually being of the army, or to the army as it exists ; and when it is used without regimental designation implies a body of infantry, this arm of defence having been the main body of modern armies." Thus the claimant could derive no benefit from such a construction of the act as would require a command according to rank generally, not brevet rank specially.

But the act does require a command according to his *brevet* rank ; and what is the effect of this limitation ? If a soldier were asked what is the appropriate command of a colonel of infantry, he would say a regiment ; and if he were asked what is the appropriate command of the colonel of ordnance, he would say the ordnance corps. In each case he would look beyond the naked rank, and consider the description of force in which the rank is held. And so in this case must we. I maintain that the difference between the commissions of major by brevet in the army and major of ordnance is of the same nature as the difference between the commission of major of infantry and major of ordnance ; and that the condition of the act of 1818, requiring a command according to *brevet* rank, is as specific as if it had required a command in a certain *arm*. If this be so, the petitioner gains nothing by his attempt to show that his command was that of a major of ordnance, since he does not show that the commands of ordnance officers and brevet officers are the same.

How, then, should the appropriate commands of brevet officers be ascertained ? I answer by statute, if statutes had been passed ; and as the statutes are silent, then by the regulations of the President—the commander-in-chief of the army. That he has authority to assign duties to officers has been held by the Supreme Court in the case of *Gratiot vs. The United States*, (4 How., 80 ;) and in that case the court said they had often held that army regulations have the force of law. And this mode of determining the commands of brevet officers was resorted to by the Supreme Court in the case of *United States vs. Freeman*, (3 Howard, 564,) where the court held generally (p. 566) that officers were entitled to brevet pay when exercising command according to the provisions of the regulations in force from time to

time. The case came up on a certificate of division from the circuit court of the United States for the district of Massachusetts ; and the district court, in proceeding, after having received the answers of the Supreme Court, ruled as follows : (United States *vs.* Freeman, 1 W. and M., 45.)

“ The act of April 16, 1818, ch. 64, 3 Stat., 427, on which the claim depends, requires that brevet officers, in order to receive pay as such, must be then on duty, and having a command according to their brevet rank, and at no other time.

“ What, then, constitutes a command according to their brevet rank ?

“ By the Army Regulations of 1825, which governed this question till 1836, (3 How., 564,) it was provided that a lieutenant colonel by brevet must be considered to exercise a command equal to his brevet rank when he commanded a battalion.

“ We entertain an opinion that whatever meaning may at times be affixed to the word *battalion*, it must by the spirit of this regulation, and the laws connected with it, be construed to mean here, at least, two organized companies, with their requisite officers as well as men.

* * * * *

“ In 1836 a new order was issued by the War Department requiring a still larger command for a brevet lieutenant colonel, in order to entitle him to extra pay, as ‘ four companies instead of two,’ or to command as lieutenant colonel of a regiment. A like construction must be given to the word *company* here, in order to come within the spirit and reason of the allowance. It should be an organized company, and have a suitable number of officers as well as men.”

Both the courts recognize the authority of the department to determine the command of a brevet officer, and they refer to the regulations alone to determine the command in the case before them. Both courts cite regulations enlarging or varying the commands of brevet officers. The regulations of 1836, says the district court, required a larger command than the regulations of 1825 for a brevet lieutenant colonel ; but if commands of brevet officers are to be determined by reference to commands in regiments or corps, how could the former be enlarged or diminished without varying the latter ? How could the appropriate command of a brevet lieutenant colonel be at one time two companies, and at another four, when a lieutenant colonel’s command in the line remained the same at both periods ?

We must look, then, to regulation alone, in the absence of statute, to determine the amount and description of force which constitute the appropriate command of brevet officers. The regulation in force during the period covered by this claim was that above cited from the edition of Army Regulations of 1825, revised by Major General Scott, and it determines the appropriate command of a brevet major to be a battalion. There is no pretence that the petitioner had command of a battalion ; all that is shown is, that the average number of men under his direction, from 1828 to 1834, was ninety, exceeding the number in a company, but not equal to two companies, still less to a battalion, (see report from the Ordnance office of February, 1833 ;) nor were they organized as a battalion, nor could they

have been, as some were hired men on daily wages, (report of December 12, 1857.)

But the claimant not only fails to show not only that he had the command presented for the brevet rank of major, he fails even to show by *competent evidence* that the command he had was equal to, or appropriate to, or according to, the rank of major in the ordnance corps or in any corps.

He produces nothing on this point but the certificate of Mr. Secretary Poinsett, which affirms that Major Baker's command was equal in its importance, as well as in its numerical force and responsibility, to the command of a major of ordnance.

Importance and responsibility are subjects of opinion and judgment. They are incorporeal qualities, and no one will pretend that they form any part of the elements of a command. A company is but a captain's command, whether it guard the pass of a Thermopylæ or parade in the park on a gala day. The only tangible portion of the allegation is as to the numerical force; this force is shown by evidence, not before Mr. Poinsett, to have been partly composed of hired, not enlisted men, and it is a question of law, not to be determined by evidence, whether such hired men can constitute a command. The case above cited from 1 W. & M. determines that they cannot. Moreover, the only proper way to prove the quality of numerical force would be to state what numerical force a major of ordnance appropriately commands, and then to prove that the claimant commanded such a force. Mr. Poinsett states neither the appropriate command of a major of ordnance, nor the actual command of the claimant. It states only a conclusion which is incapable of being contradicted.

Of the mischiefs which the act of 1818 was intended to remedy.

To attempt to regulate pay according to the comparative importance of the duties performed instead of the command held, would introduce a thousand changing elements into the determination of the question, instead of the simple and invariable rule contemplated by the act of 1818—that is, the description of the military body under the officer's command. It would introduce a mode of determination infinitely less liable, and much more subject to abuse, than that which existed before the act of 1818 was passed, and which on account of the abuses practiced under it was superseded.

The 9th section of the act of July 6, 1812, gave brevet pay to officers commanding separate posts, districts, or detachments. Under this act, says Mr. Attorney General Wirt in his opinion of December 29, 1821, (1 Opinions, 525,) "separate posts and districts were created and multiplied as if to open a wide theatre for its more extensive operation; and there were few, if any, brevets in the army which did not draw brevet pay." And so says Mr. Berrien in his opinion of July 18, 1829, (2 Opinions, 231.) The President, under the act of 1812, "had thus the power, in the arrangement and distribution of the army, to increase the amount of brevet pay by multiplying the number of separate posts. In point of fact, I understand that shortly after the termination of the late war, this power was freely resorted

to as a means at the disposal of the Executive by which merit might be rewarded."

If this was the mischief to be remedied, it requires no argument to show that the construction which the claimant seeks to place upon the act of 1818 will not effect the object. Even under the act of 1812 some limit was imposed on the liberality of the Executive, by restricting the allowance of brevet pay to officers having certain defined military commands; but the construction contended for includes all these commands, (because all posts, districts, and detachments may be deemed important commands,) and it includes, besides, all other employments which, in the opinion of a liberal Secretary of War, may be deemed to be commands, and to be of a certain degree of importance—such as the charge of a survey; the construction of a fort, or the building of an aqueduct. Officers so employed have often drawn brevet pay.

In the foregoing view of the questions involved in this case, I have referred to no decisions of the War Department or opinions of the Attorneys General upon individual cases. The decisions of the former depend greatly on the notions of liberality entertained by the Secretary for the time being, or on the personal merits of the claimant; and the series is therefore too contradictory to be cited here as authority; while the opinions of the Attorneys General are equally unreliable, since they concern questions which, Mr. Wirt said, (1 Opinions, 547,) "do not depend on positive law only, but call for an intimate knowledge of army regulations and organization, which constitutes no part of the service of my profession." In regard to the opinions of Attorneys General, I will only say that I have found no opinion which acknowledges any other guide or rule in the determination of questions of command than the statutes and army regulations.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

JUNE 6, 1859.

RUFUS L. BAKER *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the court.

This is a claim for the difference between the pay and emoluments of a captain of ordnance and those of a major by brevet, from the 1st of May, 1828, to the 31st of October, 1834. The amount claimed is not, in terms, stated in the petition.

The claimant was commissioned a captain of ordnance in the service of the United States on the 1st of June, 1832, to rank as such from the 30th of May of that year. Whilst he was such captain, to wit, on the 1st of September, 1829, the rank of major by brevet in the army of the United States was conferred on him, to rank as such from the 21st of May, 1827.

During the time for which this claim is made, viz: from the 1st of May, 1828, to the 31st of October, 1834, the claimant was a captain of ordnance, as aforesaid, and had the rank of a major by brevet, as aforesaid.

The question which this case presents is: was the claimant, under the circumstances of the case, entitled to the pay and emoluments of a major in the army at any time during the aforesaid period?

The act of Congress of 1818 on the subject is as follows:

“That officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty, and having a command according to their brevet rank, and at no other time.” (3 Stat. at L., 427.)

The following army regulation of 1825, in force during said period, is as follows:

“Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank; for example, a brevet captain must command a company; a brevet major and a brevet lieutenant colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier general, a brigade; a brevet major general, a division.” (See 3 Howard, 559, 566.)

The above act of 1818 and said army regulation of 1825 govern this case. They show that, to establish this claim, the claimant must prove that during the period embraced by the claim he was on duty, and had the command of a battalion in the army.

Now, what was the command of the claimant during said period?

The following letters are the only evidence on the subject.

“ORDNANCE OFFICE,

“Washington, February 1, 1838.

“SIR: It appears from the records of this office that the number of officers and men composing your command at the Allegheny arsenal, during the several years herein stated, was as follows, viz:

“ In the year 1828	-	-	-	-	-	-	62
1829	-	-	-	-	-	-	83
1830	-	-	-	-	-	-	61
1831	-	-	-	-	-	-	47
1832	-	-	-	-	-	-	50
1833	-	-	-	-	-	-	55
1834	-	-	-	-	-	-	55
1835	-	-	-	-	-	-	61
1836	-	-	-	-	-	-	117
1837	-	-	-	-	-	-	145

“ And that a number estimated at the lowest at thirty men, and not included in the foregoing reports to this office, were likewise attached to your command during the years 1830, '31, '32, '33, '34, and '35, thus augmenting your command during the whole time to a force exceeding the command of a captain. The foregoing numbers vary in some respects from those stated in my letter to the Secretary

of War of the 2d of January last, owing to the omission in that letter of the officers of your command.

“Very respectfully, &c.,

“G. BOMFORD,
“Colonel of Ordnance.

“Major R. L. BAKER.”

“ORDNANCE OFFICE,
“Washington, December 12, 1857.

“SIR: I have to acknowledge your letter of the 11th instant, in relation to the number of men under the command of Major R. L. Baker, at Allegheny arsenal, in the years 1828 to 1837, both inclusive, and in reply have to state that the number of men reported in the letter alluded to by you from the colonel of ordnance to Major Baker, of February 1, 1838, embraced all the persons under his orders, hired as well as enlisted.

“Respectfully, &c.,

“H. K. CRAIG,
“Colonel of Ordnance.

“JOHN D. MCPHERSON, Esq.,
“Deputy Solicitor Court of Claims, Washington.”

All that the letters show is, that during the years in question, namely, from 1828 to 1834, the claimant had a command at Allegheny arsenal; that the highest number of officers and men under his command there in any one of those years was ninety-one; that the number in the other years ranged from seventy-seven to eighty-five; that some of the men were enlisted and some hired, but how many of each kind is not stated.

There is nothing in those facts to show that the claimant had the command of a battalion during any part of said time.

A case somewhat similar to the present one occurred in the circuit court of the United States for the district of Massachusetts. The defendant, in a suit against him by the government, claimed the brevet pay of a lieutenant colonel. The court, in an opinion against the claim, said: “By the army regulations of 1825, which governed this question till 1836, (3 How., 564,) it was provided that a lieutenant colonel by brevet must be considered to exercise a command equal to his brevet rank when he commanded a battalion. We entertain an opinion that whatever meaning may, at times, be affixed to the word battalion, it must, by the spirit of this regulation and the laws connected with it, be construed to mean here, at least, two organized companies, with their requisite officers as well as men.” (United States *vs.* Freeman, 1 Woodbury and Minot, 45.)

The claimant, to show that his command at said arsenal entitled him to the pay and emoluments claimed, relies on a decision of Mr. Poinsett, Secretary of War. That decision is copied into the petition. The main part of it is as follows:

“It appears that the command held by Major Baker from the year 1828 to the present time is one of the first importance in his corps, and fully equal, in its numerical force and responsibility, to the com-

mand of a major of ordnance ; and accordingly the department sanctioned his application for the pay and allowances of his brevet rank from the 1st of August, 1837, but deemed it proper that a retrospective allowance, involving an amount not included in previous estimates and appropriations, should receive the sanction of Congress."

We do not know what evidence was before Mr. Poinsett, and, of course, can form no opinion as to the correctness of his decision relative to the numerical force of the claimant's command. If, however, the Secretary means, by the word "responsibility," anything in addition to numerical force, we think that he is, so far, mistaken. The claimant's responsibility, arising from the value of public property in his charge, cannot affect the case. The act of Congress of 1818, when speaking of a command according to brevet rank, means a command of men, not a care of public property ; and the army regulation of 1825, when speaking of a command equal to brevet rank, means a command of men. And said act and regulation both mean a command of men belonging to the army.

The claimant's brevet rank did not of itself entitle him to the pay and emoluments of a major. Notwithstanding his brevet commission, he remained limited to the command and pay of a captain under his lineal commission until he should be assigned, by proper authority, to the command of a battalion in the army, and until, in consequence of such assignment, he should actually exercise that command, and then only for the time of its actual exercise.

But there is no evidence that the claimant, either with or without orders, ever commanded a battalion, that is, at least two organized companies. The whole number of officers and enlisted men and hired men under him during any of the time aforesaid did not exceed ninety-one ; and for aught that appears, two-thirds or more of the men may have been mere hired laborers for daily or monthly wages. It is impossible, therefore, from the evidence, to say that the claimant had under him, at any portion of the time referred to, any number of enlisted men which it was not his duty to command as a captain of ordnance.

It is objected by the solicitor that, at all events, there is no ground for this claim, because the claimant was acting in his own corps ; but we have not found it necessary to examine that point.

It is the opinion of the court that the claimant has no cause of action.

HARRIET B. MACOMB, ADMINISTRATRIX OF GENERAL
ALEXANDER MACOMB, DECEASED.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of Harriet B. Macomb, administratrix of General Alexander Macomb, deceased, *vs.* The United States:

1. The petition of the claimant.
2. Documents filed as evidence, transmitted to House of Representatives.
3. Claimant's brief.
4. United States Solicitor's brief.
5. Opinion of the Court, adverse to the claim, delivered by Blackford, J.
6. Separate opinion by Judge Loring, concurring.

By order of the Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 5th day of December, A. D. 1859.

[L. S.]

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Judges of the United States Court of Claims:

The petition of Harriet B. Macomb, widow and sole executrix of General Alexander Macomb, deceased; Alexander S. Macomb, William H. Macomb, John Mason, and Catharine, his wife; Henry Stanton, and Alexandrine, his wife; John Macomb, jr.; Sarah Stanton, Morris S. Miller, and Jane Octavia, his wife, respectfully shows that your petitioners, excepting said Harriet B. Macomb, Henry Stanton, John Mason, and Morris S. Miller, are the sole heirs at law and distributees of General Alexander Macomb, late commanding general of the army of the United States.

They further show that upon the reduction of the army in 1821 General Macomb was retained with the rank of colonel and the brevet rank of major general; that in May, 1821, he was assigned to the command of the corps of engineers, the topographical engineers, the Military Academy, and a large force of civil engineers, artisans, and laborers employed upon different military works, and held and exercised this command from June 1, 1821, to May 23, 1828; that his

said command consisted of four distinct corps, and numbered nearly five thousand men ; that while the proper command of a major general is a division, consisting of four regiments, it is the rational and has long been the settled construction, and is in accordance with the precedents, that in case of staff and engineer officers it is not necessary that their command should be composed of troops organized into regiments and companies to entitle them to the pay and emoluments of the brevet rank ; that both in number of corps, in numerical force, and the extent of territory embraced by it, the command of General Macomb equalled that of a major general, and equalled, if it did not exceed, that of any officer who actually exercised the command and received the pay of major general at that time ; that under the act of Congress of April 16, 1818, entitled " An act regulating the pay and emoluments of brevet officers," (section 1,) General Macomb was entitled to the full pay of major general for the period of his aforesaid command ; that although the senior of others who received the same brevet rank, and exercising a command equal, if not superior, to theirs in importance, numbers, and extent of territory, General Macomb was the only officer who received the rank of brevet major general for services in the war of 1812 who did not also receive the pay and emoluments of that rank.

They further show that in 1827 General Macomb presented to the Secretary of War a claim for the difference between the pay of brigadier general, which had been allowed to him, and that of major general, from the date of his appointment to his aforesaid command ; that failing to get the claim allowed by the Secretary of War or Comptroller of the Treasury, he applied to Congress at the second session of the twenty-second Congress ; that in 1834, by a resolution of the House of Representatives, it was referred to the Secretary of War, who was proceeding to act upon it when the President directed all accounts of the kind to be referred to Congress ; that at the second session of the twenty-fifth Congress said claim was passed in the House of Representatives and rejected in the Senate ; that General Macomb continued to urge it upon the War Department, without success, until his death.

They further show that no part of the claim has been assigned.

They state the claim as follows, viz :

For difference between pay of brigadier and that of major	
general, from June 1, 1821, to May 23, 1828.....	\$13,573 17
Interest	

JOHNSON & COX, *Attorneys.*

WAR DEPARTMENT, *September 29, 1836.*

I have examined the claim of General Macomb, presented for the difference in pay between a major general and brigadier general, as herein set forth.

I do not feel myself at liberty to act on this subject, in consequence of the general direction of the President concerning the examination of accounts of this nature.

General Macomb's claim certainly presents a very strong feature, when the decision of this department is taken into view in other cases, establishing the principle that a command entitling to brevet pay and allowances may be composed of persons not soldiers employed in the public service, and under the general direction of the head of a bureau, and more especially when taking into consideration the fact that General Macomb was, by the order of the President issued 17th of May, 1821, assigned to the command of the Engineer department in his capacity of major general by brevet, and by no other rank, as well as the extent of his command, it appears to me that his claim is equitable.

LEWIS CASS.

A.

The United States to Major General Alexander Macomb.

Dr.

On what account.	Commencement and expiration.		Term of service charged.		Pay per month.	Number of days.	Number of rations per day.	Total number of rations.	Post or place where due.	Price of rations.	Amount.
	From—	To—	Months	Days.							
Pay for myself	June 1, 1821	May 23, 1828	83	23	\$96 00	.....	.....	.....	.....	.....	\$8,039 07
Pay for one private servant, not soldier	do.....	do.....	83	23	5 00	.....	.....	.....	.....	.....	417 71
Forage for two horses	do.....	do.....	83	23	16 00	.....	.....	.....	.....	.....	1,339 85
Clothing for one private servant, not soldier	do.....	do.....	83	23	2 50	.....	.....	.....	.....	.....	209 34
Subsistence for myself	do.....	do.....	.....	.....	.....	2,548	6	15,288	Washington City...	\$0 20	3,057 60
Subsistence for one private servant, not soldier...	do.....	do.....	.....	.....	.....	2,548	1	2,548	do.....	20	509 60
											13,573 17

This account is for the difference of pay between that of a brigadier general and major general by brevet. On the organization of the peace establishment of 1821, the President issued a general order, dated May 17, 1821, arranging the troops and organizing the commands, in which arrangement I was assigned to the command of the Engineer department as major general, but received only the pay of a brigadier general. My command consisted of the Corps of Engineers, the Corps of Topographical Engineers, the Military Academy, including the Corps of Cadets and the Civil Engineers, making a numerical force equal to the whole army. This especial assignment of the President to the command of the Engineer department, in my capacity of major general, and in no other capacity, as will appear by reference to general order of May 17, 1821, and the amount of the command, is deemed a full title to my pay as major general.

A. MACOMB, Major General.

B.

ADJUTANT AND INSPECTOR GENERAL'S OFFICE, *May* 17, 1821.

GENERAL ORDERS.

In pursuance of the act of Congress, entitled "An act to reduce and fix the military peace establishment of the United States," passed the 2d of March, 1821, the President has directed that the following list of officers, the following organization of regiments and *commands*, with the following distribution of the troops, shall constitute the peace establishment of the United States from and after the 1st of June next.

ARMY LIST.

Names and rank.	Date of appointment.	Brevet and former commissions.	Remarks.
Jacob Brown, major general.....	Jan. 24, 1814	-----	Washington.....
Edmund P. Gaines, brig. general.	March 9, 1814	August 15, 1814, major general by brevet.	
Winfield Scott.....do.....	March 9, 1814	July 25, 1814, major general by brevet.	
Thos. S. Jesup, brigadier general and quartermaster general.....	May 8, 1818	-----	Washington.....
James Gadsden, colonel and ad- jutant general.....		-----	Washington.....
John E. Wool, inspector general.	April 29, 1816	Colonel.....	
James Gadsden.....do.....	Oct. 1, 1820	do.....	
William Linnard, quartermaster.	May 12, 1813	Major.....	
Henry Stanton, quartermaster...	May 13, 1820	do.....	
[For assistant quartermasters, see officers of the line.]			
Peter Fayssoux, storekeeper quar- termaster's department.....			St. Louis.....
Samuel Perkins, storekeeper quar- termaster's department.....			Detroit.....
John D. Orr, storekeeper quarter- master's department.....			New Orleans.....
H. A. Fay, storekeeper quarter- master's department, provi- sionally retained.....			Albany.....
SUBSISTENCE DEPARTMENT.			
Colonel George Gibson, commis- sary general of subsistence.....	April 18, 1818	Colonel of staff, April 29, 1816.	Washington.....
[For assistant commissaries of subsistence see the subalterns of the line.]			
PURCHASING DEPARTMENT.			
Callender Irvine, commissary of purchases.....	Aug. 8, 1812	-----	Philadelphia.....
Archibald Steele, storekeeper....			do.....
PAY DEPARTMENT.			
D. Parker, paymaster general.....	June 1, 1821	Brigadier general of staff, Novem- ber 22, 1814....	Office, Washington

B—Continued.

Names and rank.	Date of appointment.	Brevet and former commissions.	Remarks.
Thomas Wright, paymaster.....	June 22, 1815	Captain.....	Pensacola.....
Asher Phillips.....do.....	Aug. 26, 1815	do.....	Third infantry.....
Alphonso Whetmore.....do.....	Oct. 14, 1815	do.....	Sixth infantry.....
Ben. F. Larned.....do.....	Nov. 24, 1815	do.....	Seventh infantry..
Satterlee Clark.....do.....	April 29, 1816	Major.....	Utica, New York..
Joseph Woodruff.....do.....	do.....	do.....	Charleston, S. C..
David Gwynn.....do.....	do.....	do.....	Detroit, Mich. Ter.
David S. Townsend.....do.....	do.....	do.....	Boston, Mass.....
Jacob W. Albright.....do.....	July 9, 1816	Captain.....	Philadelphia.....
Charles B. Tallmadge.....do.....	March 27, 1818	do.....	New York.....
Daniel Randall.....do.....	July 21, 1818	do.....	Baton Rouge.....
Charles H. Smith.....do.....	Nov. 24, 1819	do.....	Norfolk, Virginia..
Thomas Biddle.....do.....	Aug. 24, 1820	Major.....	St. Louis.....
A. A. Massias.....do.....	Dec. 12, 1820	do.....	St. Augustine.....
MEDICAL DEPARTMENT.			
Joseph Lovell, surgeon general..	April 18, 1818	do.....	Washington.....
Thomas Lawson.....surgeon..	May 21, 1813	do.....	Seventh infantry...
Thomas G. Mower.....do.....	June 30, 1814	do.....	Green Bay.....
B. F. Harney.....do.....	Aug. 17, 1814	do.....	Baton Rouge.....
W. V. Wheaton.....do.....	Sept. 4, 1816	do.....	Sackett's Harbor...
W. S. Madison.....do.....	Oct. 5, 1816	do.....	Dead.....
M. H. Elliott.....do.....	Oct. 31, 1817	do.....	Pensacola.....
John Gale.....do.....	April 18, 1818	do.....	Council Bluffs.....
Josiah Everett.....do.....	Jan. 28, 1820	do.....	Fort Columbus.....
Edward Purcell.....do.....	June 18, 1821	do.....	St. Peters.....
Geo. W. Maupin, assistant surgeon	Nov. 5, 1802	do.....	Fort Nelson, Va...
Joseph Goodhue.....do.....	Feb. 8, 1803	do.....	Fort Constitution..
James H. Sargeant.....do.....	March 6, 1806	do.....	Fort Sullivan.....
Sylvester Day.....do.....	Dec. 9, 1807	do.....	Pittsburg Arsenal..
William Ballard.....do.....	March 24, 1812	do.....	Fort Niagara.....
William Turner.....do.....	Sept. 29, 1812	do.....	Fort Wolcott.....
Hanson Catlett.....do.....	Feb. 18, 1813	do.....	Fort Washington..
Foster Swift.....do.....	Feb. 18, 1814	do.....	Fort Trumbull...-
John Trevitt.....do.....	April 8, 1814	do.....	Died Aug. 18, 1821.
William N. Mercer.....do.....	Nov. 22, 1814	do.....	Resig'd July 1, 1821.
T. I. C. Monroe.....do.....	April 29, 1816	do.....	Arsenal, Richmond.
Samuel B. Smith.....do.....	Nov. 12, 1816	do.....	Fort Mifflin.....
James Mann.....do.....	April 18, 1818	do.....	Boston harbor....
J. Wallace.....do.....	do.....	do.....	Annapolis.....
William Stewart.....do.....	do.....	do.....	Fort McHenry....
Joseph Eaton.....do.....	do.....	do.....	Fort Preble.....
B. Delavan.....do.....	do.....	do.....	Detroit.....
Robert Archer.....do.....	do.....	do.....	Fort Norfolk.....
George C. Clitherall.....do.....	do.....	do.....	Fort Johnson, N. C.
Squire Lea.....do.....	May 15, 1818	do.....	Fort St. Philip....
Joseph P. Russell.....do.....	Aug. 10, 1818	do.....	Fort Jackson, Sav'h.
Richard Weightman.....do.....	Aug. 21, 1818	do.....	Amelia.....
W. H. Livingston.....do.....	Feb. 3, 1819	do.....	Arsenal, Watervleit.
I. P. C. Macmahon.....do.....	July 23, 1819	do.....	Charleston harbor.
William Beaumont.....do.....	Dec. 4, 1819	do.....	Mackinac.....
Egbert H. Bell.....do.....	Jan. 28, 1820	do.....	Resigned July 16, 1821.
William H. Nicoll.....do.....	do.....	do.....	Council Bluffs.....
Robert French.....do.....	April 12, 1820	do.....	Belle Fontaine....
Chas. N. M'Coskry.....do.....	do.....	do.....	Dead.....
James Cutbush.....do.....	May 16, 1820	do.....	West Point.....

B—Continued.

Names and rank.	Date of appointment.	Brevet and former commissions.	Remarks.
Wm. S. Comstock, ass'nt surgeon	Oct. 12, 1820	-----	New York-----
Richard Randall.....do.....	-----do-----	-----	Charleston harbor.
George B. M'Knight.....do.....	Oct. 13, 1830	-----	Fort Smith-----
Lyman Foot.....do.....	Dec. 12, 1820	-----	Plattsburg-----
Thomas P. Hall.....do.....	-----do-----	-----	Chicago-----
S. H. Littlejohn.....do.....	June 1, 1821	-----	Sackett's Harbor...
C. A. Finley.....do.....	-----do-----	-----	With the 7th inf'y.
Chas. Mendenhall.....do.....	-----do-----	-----	Prairie du Chien...
R. M. Coleman.....do.....	-----do-----	-----	With the 7th inf'y.
Benjamin King.....do.....	-----do-----	-----	Baton Rouge-----
A. P. Merrill.....do.....	-----do-----	-----	Pensacola-----
H. F. Hall.....do.....	-----do-----	-----	Green Bay-----
Prestley H. Craig.....do.....	-----do-----	-----	Fort Armstrong...
Charles Sloan.....do.....	-----do-----	-----	Baton Rouge-----
John Jackson.....do.....	-----do-----	-----	Pensacola-----
John A. Brearton.....do.....	July 1, 1821	-----	Washington-----
Henry Stevenson.....do.....	July 16, 1821	-----	St. Marks-----
Mordica Hall.....do.....	Oct. 28, 1821	-----	-----
ENGINEER DEPARTMENT.			
<i>Corps of Engineers.</i>			
Alexander Macomb, chief engineer.....	June 1, 1821	Major general by brevet, September 11, 1814....	Headquarters, Washington.
Simon Bernard, assistant engineer	Nov. 16, 1816	Brigadier general by brevet.	
Chas. Gratiot, lieutenant colonel.	March 31, 1819	-----	-----
J. G. Totten.....major.....	Nov. 12, 1818	Lieut. colonel by brevet, September 11, 1814.	-----
Sam. Babcock.....do.....	March 31, 1819	-----	-----
Sylv. Thayer.....captain..	Oct. 13, 1813	Major by brevet, Feb'y 20, 1815.	-----
R. E. De Russey.....do.....	Feb. 9, 1815	Brevet, September 11, 1814.	-----
Fred. Lewis.....do.....	Oct. 1, 1817	-----	-----
T. W. Maurice.....do.....	Nov. 12, 1818	-----	-----
Hipol. Dumas.....do.....	March 31, 1819	-----	-----
John L. Smith.....do.....	Aug. 29, 1820	-----	-----
Hor. C. Story.....1st lieutenant.	April 15, 1818	Brevet, September 17, 1814.	-----
George Blaney.....do.....	Nov. 12, 1818	-----	-----
Thos. I. Leslie.....do.....	March 31, 1819	-----	Paymaster, Washington.
Wm. H. Chase.....do.....	-----do-----	-----	-----
Rd. Delafield.....do.....	Aug. 29, 1820	-----	-----
Andrew Talcott.....do.....	Oct. 10, 1820	-----	-----
Wm. A. Eliason...2d lieutenant.	July 1, 1819	-----	-----
Fred'k A. Underhill.....do.....	-----do-----	-----	-----
Cornelius A. Ogden.....do.....	-----do-----	-----	-----
Henry Brewerton.....do.....	-----do-----	-----	-----
Stephen Tuttle.....do.....	Aug. 29, 1820	Brevet, July 1, 1820.	-----
And. J. Donelson.....do.....	Oct. 1, 1820	Brevet, July 1, 1820.	-----

B—Continued.

Names and rank.	Date of appointment.	Brevet and former commissions.	Remarks.
<i>Topographical Engineers.</i>			
John Anderson.....major..	April 12, 1813	-----	-----
Isaac Roberdeau.....do....	April 29, 1813	-----	-----
John J. Abert.....do....	Nov. 22, 1814	-----	-----
Jas. Kearney.....do....	April 29, 1816	-----	-----
Stephen H. Long.....do....	do	-----	-----
P. H. Perrault.....do....	Feb. 17, 1817	-----	-----
<i>Assistant Topographical Engineers.</i>			
Hugh Young.....captain..	Feb. 19, 1817	-----	-----
William Tell Poussin.....do....	March 6, 1817	-----	-----
John Le Conte.....do....	April 18, 1818	-----	-----
Hartman Bache.....do....	July 24, 1818	-----	-----

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions and batt.
FIRST REGIMENT OF ARTILLERY.		
<i>Colonel.</i>		
Moses Porter.....	Mar. 12, 1812	Brig. gen. bvt., Sept. 10, 1813.
<i>Lieutenant Colonel.</i>		
G. Bomford.....	Feb. 9, 1815	Bvt., Dec. 22, 1814, ordnance.
<i>Major.</i>		
John B. Walbach.....	April 25, 1818	Lt. col. bvt., May 1, 1815.
<i>Captains.</i>		
A. McDowell.....	April 1, 1812	
J. B. Crane.....	July 6, 1812	Maj. bvt., Nov. 13, 1813.
A. S. Brooks.....	do.....	Maj. bvt., Sept. 11, 1814.
J. L. Eastman.....	July 31, 1813	
James Dalliba.....	Aug. 5, 1813	Maj. bvt., Feb. 9, 1815, ordnance.
S. Churchill.....	Aug. 15, 1813	
W. J. Worth.....	Aug. 19, 1814	Maj. bvt., July 25, 1814.
Milo Mason.....	May 17, 1816	
Henry Whiting.....	Mar. 3, 1817	Bvt., March 17, 1814, a. q. m.
F. Whiting.....	Sept. 10, 1819	
<i>First Lieutenants.</i>		
N. Baden.....	Aug. 6, 1813	
H. Saunders.....	July 14, 1814	A. C. S.
P. Melondy.....	Oct. 24, 1817	
R. M. Kirby.....	Mar. 23, 1818	Maj. staff, April 29, 1816.
J. A. Dix.....	do.....	Aid to General Brown.
G. W. Gardiner.....	April 20, 1818	A. C. S.
C. S. Merchant.....	do.....	A. C. S.
N. G. Dana.....	do.....	A. C. S.
J. S. Abeel.....	do.....	Bvt., Oct. 10, 1814.
W. T. Willard.....	do.....	
Henry W. Griswold.....	Dec. 11, 1818	
R. C. Brent.....	Mar. 5, 1819	
W. Smith.....	June 5, 1819	A. C. S.
C. Despenville.....	Sept. 10, 1819	
John C. Kirk.....	Sept. 30, 1819	
J. Simonson.....	Oct. 10, 1819	
M. A. Patrick.....	Aug. 11, 1820	A. C. S.
S. S. Smith.....	Nov. 30, 1820	
<i>Second Lieutenants.</i>		
Samuel Cooper.....	Nov. 15, 1817	Bvt., Dec. 11, 1815.
Andrew McIntyre.....	Feb. 13, 1818	A. C. S.
H. Brown.....	July 24, 1818	
Giles Porter.....	do.....	
George Webb.....	do.....	
W. B. Davidson.....	Sept. 1, 1818	
J. Howard.....	do.....	

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions and batt.
C. Wharton	Oct. 28, 1818	
D. Van Ness	Mar. 3, 1819	
Ben. Vining	July 1, 1819	
Z. J. D. Kinsley	do	
Justin Dimick	do	
G. W. Whistler	do	
J. Tyler	do	
W. H. Swift	do	
A. Pickevin	Aug. 13, 1819	
Ben. Walker	Dec. 31, 1819	
G. D. Ramsay	July 1, 1820	
Wm. T. W. Tone	July 12, 1820	
SECOND REGIMENT OF ARTILLERY.		
<i>Colonel.</i>		
N. Towson	June 1, 1821	
<i>Lieutenant Colonel.</i>		
James House	Mar. 3, 1813	
<i>Major.</i>		
Jacob Hindman	June 26, 1813	Col. bvt., May 17, 1815.
<i>Captains.</i>		
Wm. Gates	Mar. 3, 1813	
A. C. W. Fanning	Mar. 13, 1813	Maj. bvt., Aug. 15, 1814.
I. Roach, jr.	April 13, 1813	
J. F. Heileman	May 5, 1813	
George Talcott	Aug. 5, 1813	Ordnance.
Charles J. Nourse	June 17, 1816	Maj. staff, Sept. 14, 1814.
Frs. S. Belton	July 31, 1817	Maj. staff, Oct. 18, 1814.
Rd. A. Zantzinger	Dec. 12, 1818	Bvt., Aug. 15, 1814.
J. Mountfort	Aug. 11, 1819	Bvt., Sept. 11, 1814.
Thomas C. Legate	May 13, 1820	
<i>First Lieutenants.</i>		
David T. Welch	April 13, 1830	Capt. bvt., June 20, 1814.
Elijah Lyon	Jan. 1, 1817	A. C. S.
E. Kirby	May 1, 1817	Aid to General Brown.
J. W. Thompson	May 21, 1817	
Richard Bache	June 15, 1817	Bvt., Apr. 17, 1813, a. c. s.
Lewis G. De Russey	April 20, 1818	
Charles Mellon	do	A. C. S.
John S. Pierce	do	
Allen Lowd	do	A. C. S.
G. S. Wilkins	do	
Timothy Green	do	A. C. S.
H. W. Fitzhugh	do	A. C. S.
J. J. Davis	do	
Robert L. Armstrong	July 2, 1818	
Patrick H. Galt	Sept. 26, 1818	
H. S. Mallory	May 31, 1819	

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions and batt.
W. Wells	Aug. 28, 1819	A. C. S.
C. M. Eakin	May 13, 1820	A. C. S.
<i>Second Lieutenants.</i>		
W. E. Williams	June 30, 1818	
Samuel Ringgold	July 24, 1818	
Ed. Harding	do	
Joseph Strong	do	
James Green	Sept. 11, 1818	A. Q. M.
Abm. C. Fowler	Mar. 3, 1819	
Martin Thomas	Mar. 31, 1819	
Jacob A. Dumest	July 1, 1819	
Henry Gilbert	do	
Lemuel Gates	Aug. 13, 1819	
Thomas P. Ridgeley	do	
James W. Webb	do	
John R. Bowes	Oct. 10, 1819	
James A. Chambers	July 1, 1820	
W. C. De Hart	do	
Daniel D. Tompkins	do	
William P. Buchanan	do	
Joshua Barney	do	
Jno. M. Swift	do	
THIRD REGIMENT OF ARTILLERY.		
<i>Colonel.</i>		
Walker K. Armistead	Nov. 12, 1818	
<i>Lieutenant Colonel.</i>		
G. E. Mitchell, (resigned June 31, 1821)	Mar. 3, 1813	Col. bvt., May 5, 1814.
W. Lindsay	do	
<i>Major.</i>		
James Bankhead	Aug. 15, 1813	
<i>Captains.</i>		
William Wilson	May 3, 1808	Maj. bvt., May 3, 1818.
Roger Jones	July 6, 1812	Lt. col. bvt., Sept. 17, '14, col. staff, Aug. 10, '18.
S. B. Archer	do	April 27, 1813, ordnance.
Thomas Stockton	Sept. 10, 1812	April 15, 1814.
Henry K. Craig	Dec. 23, 1813	
William Laval	Feb. 15, 1814	Maj. bvt., Nov. 7, 1814.
Mann P. Lomax	Nov. 17, 1814	
George N. Morris	Jan. 15, 1817	
Rufus L. Baker	May 21, 1817	
Felix Ansart	Nov. 28, 1819	
<i>First Lieutenants.</i>		
S. Spotts	May 22, 1814	Capt. bvt., Jan. 8, 1815, a. c. s.
Æneas Mackay	Dec. 1, 1816	Bvt., March 12, 1813.
Joseph P. Taylor	Nov. 24, 1817	A. c. s. bvt., July 15, 1814.

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions and batt.
I. L. Gardner.....	April 20, 1818	A. Q. M.
Thomas Childs.....	do.....	A. C. S.
C. M. Thruston.....	do.....	
W. L. Booth.....	April 25, 1818	
Thomas J. Baird.....	June 2, 1818	A. C. S.
Upton S. Frazer.....	Oct. 20, 1818	A. C. S.
Thomas W. Lendrum.....	May 30, 1819	A. C. S.
James Spencer.....	June 26, 1819	
I. A. Adams.....	July 31, 1819	
J. W. Phillips.....	Aug. 4, 1819	
Henry F. Evans.....	Aug. 8, 1819	
J. A. Webber.....	Oct. 31, 1819	A. C. S.
R. B. Lee.....	do.....	
F. L. Griffith.....	Nov. 28, 1819	
John Hills.....	Dec. 31, 1819	
<i>Second Lieutenants.</i>		
Samuel McKenzie.....	July 24, 1818	
George W. Corprew.....	do.....	
William S. Newton.....	do.....	
Joseph Hopkins.....	Mar. 3, 1819	
I. F. Hamtramck.....	July 1, 1819	
John L'Engle.....	do.....	
J. M. Edwards.....	do.....	
A. Brockenbrough.....	do.....	
L. A. Rigail.....	Aug. 4, 1819	
John Smith.....	Aug. 13, 1819	
Alexander Stewart.....	Dec. 4, 1819	A. C. S.
H. Garner.....	Jan. 28, 1820	
Thomas E. Sudler.....	July 1, 1820	
William H. Bell.....	do.....	
Francis N. Barbarin.....	do.....	
H. J. Feltus.....	do.....	
Rawlins Lowndes.....	do.....	
W. H. Kerr.....	Oct. 27, 1820	
FOURTH REGIMENT OF ARTILLERY.		
<i>Colonel.</i>		
John R. Fenwick.....	June 1, 1821	Bvt., March 18, 1813.
<i>Lieutenant Colonel.</i>		
William Macrea.....	April 19, 1814	Bvt., July 10, 1812.
<i>Major.</i>		
Abram Eustis.....	Mar. 15, 1810	Lt. col. bvt., Sept. 10, 1813.
<i>Captains.</i>		
E. Humphreys.....	Jan. 9, 1809	Maj. bvt., Dec. 28, 1814.
John A. Burd.....	July 6, 1812	Maj. bvt., Oct. 31, 1814.
B. K. Pierce.....	Oct. 1, 1813	
M. M. Payne.....	Mar. 2, 1814	
John R. Bell.....	Oct. 10, 1814	
Jer. D. Hayden.....	Feb. 9, 1815	Bvt., March 13, 1813.

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions and batt.
William Wade.....	Feb. 9, 1815	Ordnance.
William F. Hobart.....	Jan. 1, 1817	
John Erving.....	April 25, 1818	
Abm. L. Sands.....	Sept. 17, 1818	
<i>First Lieutenants.</i>		
L. Whiting.....	June 14, 1814	
Sl. Washburn.....	Jan. 15, 1817	A. C. S.
M. S. Massey.....	Aug. 5, 1817	
William L. McClintock.....	Sept. 29, 1817	A. C. S.
G. S. Drane.....	Nov. 15, 1817	
John Monroe.....	April 20, 1818	
Jac. Schmuck.....	do.....	Bvt., 25 July, 1814.
J. Ripley.....	do.....	
Hugh K. Mead.....	do.....	A. C. S.
J. Parkhurst, (died July 6, 1821).....	July 1, 1818	
James Monroe.....	Dec 31, 1818	
J. D. Graham.....	Sept. 8, 1819	
J. R. Vinton.....	Sept. 30, 1819	
W. G. McNeill.....	Dec. 4, 1819	
T. I. Gardner.....	Dec. 31, 1819	
John Symington.....	May 17, 1820	
I. M. Washington.....	May 23, 1820	A. C. S.
W. Wright.....	Aug. 23, 1820	
<i>Second Lieutenants.</i>		
Joseph N. Chambers.....	July 24, 1818	
Charles Ward.....	Oct. 1, 1818	
Henry A. Thompson.....	July 1, 1819	
William Turnbull.....	do.....	
Ethan C. Sickles.....	do.....	
James S. Hepburn.....	do.....	
Joseph D. Rupp.....	do.....	
James R. Blaney.....	do.....	
George C. Hutter.....	Jan. 28, 1820	
E. G. W. Butler.....	July 1, 1820	
J. H. Winder.....	do.....	
S. B. Dusenbury.....	do.....	
W. S. Maitland.....	do.....	
Edwin B. Alberti.....	July 12, 1820	
John T. Davidson, (dead).....	Oct. 27, 1820	
H. P. Welch.....	do.....	
P. Morrison.....	do.....	
Charles Thomas.....	June 1, 1821	
<i>Ordnance Storekeepers.</i>		<i>Station.</i>
William W. Paine.....		Richmond.
J. Snowden.....		West Point.
Jacint Laval.....		Harper's Ferry.
A. Giles.....		New York.
Thomas Harrison.....		Schuylkill.
H. McCall.....		Charleston.
D. Hopkins.....		Baltimore.
J. Whistler.....		Belle Fontaine.
H. Johnson.....		

B—Continued.

Names and rank.	Date of appoint- ment.	Brevets and former com- missions.
FIRST INFANTRY.		
Colonel.		
T. Chambers.....	Nov. 10, 1818	
Lieutenant Colonel.		
R. Butler.....	April 20, 1819	
Z. Taylor.....		
Major.		
R. Whartenby	April 13, 1817	Bvt , May 1, 1814.
Captains.		
S. W. Kearney.....	April 1, 1813	A. Q. M.
John Jones	July 29, 1813	
W. C. Beard.....	May 1, 1817	Bvt , Aug. 20, 1814.
James H. Gale.....	July 31, 1817	Bvt , Nov. 7, 1814.
Richard K. Call.....	July 1, 1818	
W. V. Cobbs.....	Mar. 31, 1819	A. q. m. major staff, Oct. 17, 1820.
G. Loomis.....	April 7, 1819	
T. F. Smith	April 25, 1819	
Truman Cross	Sept. 27, 1819	
S. H. Webb	July 9, 1820	
Wm. H. Ker	Dec. 1, 1820	
R. D. Richardson	Aug. 5, 1813	
First Lieutenants.		
Garston Powell	July 1, 1818	A. C. S.
George C. Spencer.....	Oct. 1, 1818	
E. A. Hitchcock	Oct. 31, 1818	
Wm. S. Harney.....	Jan. 7, 1819	
W. R. Jouett.....	Mar. 31, 1819	
Samuel L. Isett.....	Sept. 27, 1819	
Thos. Barker	July 23, 1820	
Const. Pierce	Sept. 3, 1820	
E. Davis	Oct. 3, 1820	
Alfred Mitchell	Dec. 1, 1820	
Second Lieutenants.		
E. J. Lambert	Mar. 10, 1819	A. C. S.
W. Malcolm.....	July 1, 1819	
J. Mackenzie	do.....	
Jasper Strong.....	do.....	
John Tucker.....	Dec. 4, 1819	
Ths. J. Ayres.....	Jan. 28, 1820	
Mart. Burke	do.....	
Samuel M'Ree	July 1, 1820	
William Day.....	Oct. 27, 1820	
Ths. P. Gywnne.....	Dec. 12, 1820	
Sutler.		
S. Culbertson.....		

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions.
SECOND INFANTRY.		
<i>Colonel.</i>		
Hugh Brady.....	July 6, 1812	
<i>Lieutenant Colonel.</i>		
W. Lawrence.....	May 8, 1818	Bvt., Sept. 15, 1814.
<i>Major.</i>		
Enos Cutler.....	Feb. 10, 1818	Bvt., May 1, 1814.
<i>Captains.</i>		
Alex. R. Thompson.....	May 1, 1814	
Newman S. Clark.....	Oct. 1, 1814	Bvt., July 25, 1814.
E. Boardman.....	Mar. 31, 1817	Bvt., Aug. 1, 1813.
J. H. Ballard.....	April 22, 1817	
T. J. Beall.....	Sept. 26, 1818	Bvt., Mar. 17, 1814.
W. Hoffman.....	May 1, 1819	
J. H. Wilkins.....	Aug. 28, 1819	
G. Dearborn.....	Sept. 30, 1819	
T. Staniford.....	Mar. 1, 1820	
Daniel Curtis.....	Oct. 17, 1820	
<i>First Lieutenants.</i>		
B. A. Boynton.....	Nov. 25, 1813	
Owen Ransom.....	April 19, 1814	
James Young.....	June 30, 1814	A. C. S.
S. B. Griswold.....	Sept. 1, 1814	
Walter Bicker, jr.....	do.....	
R. M. Harrison.....	Nov. 1, 1817	A. Q. M.
C. F. Morton.....	Mar. 31, 1819	
Seth Johnson.....	May 1, 1819	
Joshua B. Brant.....	Dec. 1, 1819	A. q. m. bvt., Sept. 17, 1814.
John Clitz.....	Dec. 31, 1819	
E. K. Barnum.....	Dec. 30, 1819	
<i>Second Lieutenants.</i>		
Henry Smith.....	June 17, 1816	
M. F. Van De Venter, (died August 27).....	July 22, 1822	
Edwin V. Sumner.....	Mar. 3, 1819	
Edmund B. Griswold.....	Aug. 13, 1819	
Samuel L. Russel.....	do.....	
David Brooks.....	Jan. 28, 1820	
Carlos A. Waite.....	do.....	
George F. Lindsay.....	July 1, 1820	
J. B. Pendleton.....	July 12, 1820	
J. S. Gallagher.....	Oct. 4, 1820	
A. Morton.....	July 1, 1821	
<i>Sutler.</i>		
R. Gray.....		

B—Continued.

Names and rank.	Date of appoint- ment.	Brevets and former com- missions.
THIRD INFANTRY.		
Colonel.		
N. Pinkney.....	May 13, 1820	
Lieutenant Colonel.		
John M'Neal, jr.	Feb. 24, 1818	Col. bvt., July 25, 1814.
Major.		
D. Baker.....	June 1, 1819	Bvt., Aug. 9, 1812.
Captains.		
C. Larrabee.....	Sept. 12, 1812	Maj. bvt., Aug. 9, 1812.
William Whistler	Dec. 31, 1812	
Stephen W. Kearney.	April 1, 1813	
B. Watson	Aug. 13, 1813	
Hez. Bradley	April 19, 1814	
John Green.....	Sept. 25, 1814	
W. C. Beard.....	May 1, 1817	
J. Garland	May 7, 1817	
W. Browning.....	Nov. 1, 1817	Bvt., Oct. 31, 1814.
R. Humphrey.....	Dec. 24, 1818	
R. B. Mason.....	July 31, 1819	
J. S. Nelson.....	Aug. 13, 1819	Bvt , April 30, 1813.
First Lieutenants.		
William G. Belknap.....	Aug. 19, 1814	A. C. S.
John B. Clark.....	May 7, 1817	
Ed. E. Brooks.....	June 1, 1817	
Andrew Lewis.....	Feb. 10, 1818	
T. J. Harrison.....	April 20, 1818	
R. C. Pomeroy	Sept. 1, 1818	
James Dean.....	Oct. 31, 1818	
A. Musser.....	June 1, 1819	
Hor. Webster.....	April 5, 1820	
Henry H. Loring	Oct. 17, 1820	
Second Lieutenants.		
Samuel W. Hunt.....	Feb. 3, 1819	A. C. S.
H. N. Baker.....	Aug. 13, 1819	
J. W. Webb.....	do.....	
J. C. Hayward.....	Jan. 28, 1820	
B. Walker.....	Dec. 11, 1819	
A. Woodward.....	May 17, 1820	
J. M. Tufts.....	July 1, 1820	
L. N. Morris.....	do.....	
Stewart Cowan	July 12, 1820	
William Tolson.....	do.....	
James B. Allen	Oct. 27, 1820	
Edwin A. Caldwell.....	do.....	
Otis Wheeler	July 1, 1821	
H. Bainbridge	do.....	

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions.
<i>Sutlers.</i>		
J. Dean, Green Bay .....	.....	.....
H. Whiting, Chicago .....	.....	.....
FOURTH INFANTRY.		
<i>Colonels.</i>		
D. L. Clinch .....	.....	.....
R. Butler	June 1, 1821	Col. staff, Mar. 5, 1814.
<i>Lieutenant Colonel.</i>		
G. M. Brooke	Mar. 1, 1819	Col. bvt., Sept. 17, 1814.
<i>Major.</i>		
J. B. Maney	May 5, 1813	.....
<i>Captains.</i>		
J. H. Vose	July 6, 1812	Maj. bvt., Aug. 4, 1814.
Saunders Donoho	do .....	.....
James H. Hook	May 20, 1813	.....
J. S. M'Intosh	Mar. 8, 1817	.....
James M. Glassell	Feb. 10, 1818	Maj. staff, May 22, 1818.
Francis L. Dade	Feb. 24, 1818	.....
Philip Wager	May 8, 1818	.....
R. Humphrey	Dec. 24, 1818	.....
Hen. Wilson	April 20, 1819	.....
R. M. Sands	April 30, 1819	.....
F. W. Brady	Dec. 31, 1820	.....
<i>First Lieutenants.</i>		
H. R. Dulany	Feb. 10, 1818	.....
William Lear	Feb. 24, 1818	.....
Jer. Yancey	Dec. 1, 1818	.....
G. W. Allen	Jan. 1, 1819	.....
J. Page	do .....	.....
Lee Slaughter	April 30, 1819	.....
E. Webb	July 31, 1819	.....
William M. Graham	Aug. 11, 1819	.....
Edw. Alexander	Aug. 20, 1820	.....
Thos. Johnston	Dec. 31, 1820	.....
<i>Second Lieutenants.</i>		
Jos. B. Shaw	Nov. 12, 1818	.....
W. H. Mann	Feb. 3, 1819	.....
R. B. A. Tate	Mar. 3, 1819	.....
Arthur W. Thornton	Nov. 30, 1819	A. C. S.
John J. Jackson	Dec. 1, 1819	.....
George Mountz	Jan. 28, 1820	.....
J. B. Triplet	Oct. 27, 1820	.....
William Martin	do .....	.....
T. Burk	do .....	.....
Edward N. Dulany	do .....	.....

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions.
<i>Sutler.</i>		
W. M. Read .....	.....	.....
FIFTH INFANTRY.		
<i>Colonel.</i>		
Josiah Snelling	June 1, 1819	.....
<i>Lieutenant Colonels.</i>		
W. Morgan .....	.....	.....
Henry Leavenworth	Feb. 10, 1818	Col. bvt., July 25, 1814.
<i>Major.</i>		
J. E. Dinkins	May 8, 1818	Bvt., May 15, 1814.
<i>Captains.</i>		
J. H. Vose	July 6, 1812	.....
S. Burbank	Mar. 13, 1813	Maj. bvt., July 25, 1814.
George Bender	May 13, 1813	A. Q. M.
John Bliss	May 13, 1813	.....
M. Marston	June 26, 1813	Maj. bvt., Aug. 15, 1814.
Ben. Watson	Aug. 15, 1813	Maj. bvt., July 25, 1814.
J. Fowle, jr.	June 10, 1814	.....
David Perry	Sept. 1, 1814	.....
Bennet Riley	Aug. 6, 1818	.....
M. J. McGee	July 10, 1815	.....
Charles L. Cass	Dec. 31, 1818	.....
T. F. Hunt	May 20, 1820	A. Q. M.
<i>First Lieutenants.</i>		
J. Plympton	July 31, 1813	.....
S. B. Griswold	Sept. 1 1814	.....
D. Wilcox	Oct. 2, 1814	.....
Rt. A. M'Cabe	Oct. 16, 1816	Bvt., May 1, 1814.
Nathan Clark	Mar. 17, 1817	A. C. S.
T. Hunt	July 1, 1817	A. C. S.
J. M'Ilvain	April 30, 1819	.....
M. Scott	Nov. 2, 1819	.....
G. Lowe	Mar. 15, 1820	.....
P. R. Green	Mar. 27, 1820	.....
E. K. Barnum	Dec. 31, 1820	.....
<i>Second Lieutenants.</i>		
S. S. Stacy	July 22, 1817	A. C. S.
C. Burbridge	June 16, 1818	.....
J. C. Russell	July 24, 1818	.....
C. C. Hobart	Oct. 8, 1818	.....
Jos. M. Baxley	Aug. 13, 1819	.....
D. Tyler	July 1, 1819	.....
A. Pickerin	Aug. 13, 1819	.....
B. Gorham	July 1, 1820	.....
W. E. Cruger	July 12, 1820	.....
Phineas Andrews	Oct. 27, 1820	.....
W. Alexander	do	.....
S. M. Capron	July 1, 1821	.....

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions.
<i>Sutlers.</i>		
L. Learned, St. Peter's.....	.....	
G. Gooding, Prairie du Chien.....	.....	
SIXTH INFANTRY.		
<i>Colonels.</i>		
H. Atkinson.....	.....	
Duncan L. Clinch.....	April 20, 1819	
<i>Lieutenant Colonels.</i>		
H. Leavenworth.....	.....	
Willoughby Morgan.....	Nov. 10, 1818	
<i>Major.</i>		
Alex. Cummings.....	April 20, 1819	
<i>Captains.</i>		
W. S. Foster.....	Mar. 13, 1813	Maj. bvt., Aug. 15, 1814.
Dan. Ketchum.....	Sept. 30, 1813	Maj. bvt., July 25, 1814.
Th. Hamilton.....	Feb. 21, 1814	
W. Martin.....	Mar. 17, 1814	
Matthew J. Magee.....	Feb. 10, 1815	
William Haile.....	May 14, 1818	
J. M'Gunnegle.....	July 12, 1818	A. Q. M.
William Armstrong.....	July 31, 1818	
B. Riley.....	Aug. 6, 1818	
James S. Gray.....	Nov. 10, 1818	
Ephraim Shaylor.....	April 30, 1819	
<i>First Lieutenants.</i>		
J. Clark, jr.....	Sept. 1, 1814	A. C. S.
John Gantt.....	April 5, 1818	
Gab. Field.....	April 15, 1818	
C. Pentland.....	July 31, 1818	
Thos. W. Kavanaugh.....	Nov. 10, 1818	
L. Palmer.....	do.	
Jacob Brown.....	Aug. 18, 1819	A. C. S.
Samuel Shannon.....	Feb. 23, 1820	
Hen. Taylor.....	Mar. 1, 1820	
Zalmon C. Palmer.....	do.	
<i>Second Lieutenants.</i>		
W. D. McCray.....	Feb. 3, 1819	
Jos. Buckley.....	Aug. 13, 1819	
William N. Wickliffe.....	Sept. 20, 1819	
John Duncan.....	Dec. 4, 1819	
Jno. Bradley.....	Jan. 28, 1820	
N. I. Cruger.....	July 1, 1820	
Thos. Noel.....	do.	
W. W. Morris.....	do.	
Wharton Rector.....	July 12, 1820	
Rd. Wells, (resigned Dec. 1, 1821).....	Oct. 27, 1828	
Jos. Buckley.....	June 1, 1821	
<i>Sutler.</i>		
Jno. O. Fallan, Council Bluffs.....	.....	

B—Continued.

Names and rank.	Date of appointment.	Brevets and former commissions.
SEVENTH INFANTRY.		
<i>Colonel.</i>		
Matthew Arbuckle.....	Mar. 16, 1820	
<i>Lieutenant Colonel.</i>		
William Lindsay.....	Mar. 12, 1813	
Z. Taylor.....		
<i>Major.</i>		
A. R. Woolley.....	Feb. 9, 1815	
<i>Captains.</i>		
William Bradford.....	July 6, 1812	Major bvt., Aug. 20, 1814.
D. E. Twiggs.....	July 6, 1812	Major bvt., Sept. 21, 1814.
W. Davenport.....	Sept. 28, 1812	
R. D. Richardson.....	Aug. 5, 1813	
J. S. Allison.....	June 25, 1814	
George Birch.....	Aug. 31, 1816	
R. B. Hyde.....	Oct 31, 1818	
Nath. Young.....	Jan. 1, 1819	
G. Leftwich.....	June 15, 1819	
T. Cross.....	Sept 20, 1819	
Daniel E. Burch.....	June 30, 1820	
<i>First Lieutenants.</i>		
H. Berryman.....	Dec. 31, 1818	
G. Murdock.....	Jan. 31, 1819	
J. Wheelock.....	Mar. 19, 1819	
Jno. Philbrick.....	April 11, 1819	
N. G. Wilkinson.....	May 31, 1819	
A. M. Houston.....	Aug. 31, 1819	
William N. Bronaugh.....	Dec. 31, 1819	
Richard Wash.....	June 30, 1820	
B. L. E. Bonneville.....	July 9, 1820	
J. B. Hobkirk.....	Oct. 31, 1820	A. C. S.
<i>Second Lieutenants.</i>		
Pierce Butler.....	Aug. 13, 1819	
John Stewart.....	do.....	
James Dawson.....	do.....	
W. S. Colquhoun.....	Dec. 4, 1819	A. C. S.
W. W. Outlaw.....	do.....	
John McCauley, (dead).....	Jan. 28, 1820	
Norman Holmes.....	do.....	
Edgar S. Hawkins.....	July 1, 1820	
R. D. A. Wade.....	Oct. 27, 1820	
Robert Ross.....	do.....	
James Dawson.....	June 1, 1821	
<i>Sutlers.</i>		
John Nicks, Arkansas.....		
W. Kendall, Red River.....		

The Board of General Officers beg leave to recommend, that in case Brevet Brigadier General Atkinson should elect to take a regiment of infantry, (say the 6th,) Colonel D. L. Clinch be, in that case, arranged to the 4th infantry, Colonel R. Butler as lieutenant colonel of the 1st infantry, Lieutenant Colonel Taylor as major of the 7th infantry, Major Woolley to the 4th artillery, as captain, in the place of Captain Sands; the latter transferred to the 1st infantry, in the place of Captain Cobbs, to be left out.

JAC. BROWN.

CITY OF WASHINGTON, May 14, 1821.

The *four* regiments of artillery—

Thirty-six companies of <i>fifty-five</i> non-commissioned officers, artificers, musicians, and privates.....	1,980
Enlisted men for ordnance duties	56

The *seven* regiments of infantry—

Seventy companies of <i>fifty-one</i> non-commissioned officers, musicians, and privates.....	3,570
And the non-commissioned staff	36

Making a total of.....	5,642
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To be distributed as follows :

FIRST REGIMENT OF ARTILLERY.

Colonel Porter, Boston.

Lieutenant Colonel Bomford, Ordnance.

Major Walbach, Portsmouth.

Brevet Major Dalliba, Ordnance.

Fort Sullivan, Maine.—Captain Mason ; First Lieutenants Dana and Brent ; Second Lieutenants Walker and Tone.

Fort Preble, Maine.—Captain Brooks ; First Lieutenants Simonson and Patrick ; Second Lieutenants Ramsay and Davidson.

Fort Constitution, New Hampshire.—Captain F. Whiting ; First Lieutenants Merchant and Griswold ; Second Lieutenants Howard and Van Ness.

Harbor of Boston, Massachusetts.—Captains Eastman and H. Whiting ; First Lieutenants Dix, Willard, Smith, and Smith ; Second Lieutenants McIntire, Kinsley, Dimick, and Swift.

Fort Wolcott, Rhode Island.—Captain Crane ; First Lieutenants Baden and Abeel ; Second Lieutenants Wharton and Pickevin.

Fort Trumbull, Connecticut.—Captain McDowell ; First Lieutenants Saunders and Kirby ; Second Lieutenants Brown and Vining.

Harbor of New York.—Captains Churchill and Worth ; First Lieutenants Melendy, Gardner, Dispinville, and Kirk ; Second Lieutenants Cooper, Porter, Webb, and Whistler.

SECOND REGIMENT OF ARTILLERY.

Colonel Towson, Fort McHenry.

Lieutenant Colonel House, Detroit.

Major Hindeman, Fort Mifflin.

Captain Talcott, Ordnance.

Fort Mifflin, Pennsylvania.—Captain Roach ; First Lieutenants Kirby and Wilkins ; Second Lieutenants Fowler and Thomas.

Fort McHenry, Maryland.—Captain Belton ; First Lieutenants Fitzhugh and Mallory ; Second Lieutenants Ringgold and Dumest.

West Point, New York.—Captain Fanning ; First Lieutenants Bache and Galt ; Second Lieutenants Green and Gilbert.

Arsenal, Watervleit, New York.—Captain Gates ; First Lieutenants Welsh and Lowd ; Second Lieutenants Strong and De Hart.

Plattsburg, New York.—Captain Zantzinger ; First Lieutenants Thompson and Eakin ; Second Lieutenants Williams and Bowes.

Fort Niagara, New York.—Captain Heilman ; First Lieutenants De Russey and Green ; Second Lieutenants Harding and Gates.

Pittsburg, Pennsylvania.—Captain Nourse ; First Lieutenants Armstrong and Wells ; Second Lieutenants Ridgely and Buchanan.

Detroit, Michigan Territory.—Captain Mountfort ; First Lieutenants Mellon and Davis ; Second Lieutenants Webb and Tomkins.

Mackinac, Michigan Territory.—Captain Legate ; First Lieutenants Lyon and Pierce ; Second Lieutenants Chambers and Barney.

THIRD REGIMENT OF ARTILLERY.

Colonel Armistead, Fort Washington.
Lieutenant Colonel Mitchell, Fort Norfolk.
Major Bankhead, Charleston.
Captain Archer, Ordnance.

Annapolis, Maryland—Captain Jones ; First Lieutenants Lendrum and Lee ; Second Lieutenants Hopkins and Stewart.

Fort Washington, Potomac—Captain Ansart ; First Lieutenants Childs and Boothe ; Second Lieutenants Hamtramck and J. Smith.

Richmond, Virginia—Captain Baker ; First Lieutenants Baird and Hill ; Second Lieutenants Bell and Barbarin.

Norfolk Harbor, Virginia—Captains Stockton and Lomax ; First Lieutenants Mackay, Fraser, Spencer, and Adams ; Second Lieutenants Corprew, Brokenbrough, Garner, and Kerr.

Fort Johnson, Smithville, N. C.—Captain Wilson ; First Lieutenants Spotts and Thurston ; Second Lieutenants McKenzie and Feltus.

Charleston Harbor, S. C.—Captains Lavall and Morris ; First Lieutenants Taylor, J. L. Gardner, Evans, and Griffith ; Second Lieutenants Newton, L'Engle, Edwards, and Lowndes.

Arsenal, Augusta, Georgia—Captain Craig ; First Lieutenants Philips and Webber ; Second Lieutenants Rigail and Sudler.

FOURTH REGIMENT OF ARTILLERY.

Colonel Fenwick, Pensacola.
Lieutenant Colonel Mac Rea, New Orleans.
Major Eustis, St. Augustine.
Captain Wade, Ordnance.

Fort Jackson, Savannah, Georgia—Captain Erving ; First Lieutenants Symington and Wright ; Second Lieutenants Thomas and Maitland.

Fernandina, Amelia Island—Captain Payne ; First Lieutenants J. Monroe and Washington ; Second Lieutenants Hepburn and Morrison.

St. Augustine, East Florida—Captains Bell and Hobart ; First Lieutenants Washburn, Drane, Ripley, and T. J. Gardner ; Second Lieutenants Sickels, Rupp, Alberti, and Davidson.

St. Marks, Florida—Captains Burd and Sands ; First Lieutenants McClintock, Pankhurst, James Monroe, and Vinton ; Second Lieutenants Blaney, Hutter, Winder, and Dusenbury.

Pensacola, Florida—Captains Pierce and Hayden ; First Lieutenants L. Whiting, Massay, J. D. Graham, and McNeil ; Second Lieutenants Jos. Chambers, Thompson, Turnbull, and Butler.

Fort St. Philip, Louisiana—Captain E. Humphrey ; First Lieutenants Schmuck and Mead ; Second Lieutenants Ward and Welch.

First regiment of infantry, Baton Rouge.
Second regiment of infantry, Sackett's Harbor.

Third regiment of infantry, Green Bay and Chicago ; at Green Bay eight, and at Chicago two companies.

Fourth regiment of infantry, Pensacola.

Fifth regiment of infantry, St. Peter's, Prairie du Chien, and Fort Armstrong ; at St. Peter's seven, at Prairie du Chien two, and at Fort Armstrong one company.

Sixth regiment of infantry, Council Bluffs.

Seventh regiment of infantry, Arkansas and Red rivers ; six companies on Red river, four on the Arkansas.

And the President further directs, until otherwise ordered, that the immediate command of all the troops, as above distributed, west of a line drawn from the southernmost point of East Florida to the northwest extremity of Lake Superior, be assigned to Brevet Major General Gaines ; and that the command of the troops east of such line be assigned to Brevet Major General Scott. The whole of Tennessee and Kentucky being considered in the western department.

The headquarters of Major General Brown will be in the District of Columbia ; the headquarters of the western department will be at Louisville, Kentucky ; and the headquarters

of the eastern department will be at Governor's Island, New York, when the generals are not on visits of inspection and tours of duty.

All officers included in the above list, and not on special duty, will forthwith join their respective regiments and commands.

Officers who are designated as assistant quartermasters and assistant commissaries of subsistence, will forthwith report, by letter, to those departments for specific instructions.

Special orders having been given to local commanders, for consolidating and reducing the troops, preparatory to this arrangement, all supernumerary non-commissioned officers, artificers, musicians, and privates, if any such remain in service, will be discharged at their respective posts as soon as practicable.

All officers whose names are not included in the above list must consider themselves disbanded on the first of June next, except quartermasters, commissaries, and storekeepers charged with the safe keeping of public property, who will remain in service until specially relieved from their accountability.

It is deemed inexpedient to continue arrests or proceedings of courts-martial which may have been instituted on officers not retained in the army. All such officers will be released from arrest and discharged from further duty.

All deserters from the army of the United States, previous to the date of this order, may peaceably and safely return to their homes, without being subject to punishment or trial, on account of such desertion. No reward or expenses will be allowed for apprehending any soldier who deserted prior to this order.

All soldiers in confinement by sentence of courts-martial, will be dismissed the service with disgrace.

The regulations relative to transfers is so far suspended that officers may be taken from one regiment or corps and arranged to another, the more perfectly to complete the organization, without consulting the individuals interested, until the first of January next.

By order :

D. PARKER,

Adjutant and Inspector General.

NOTE —In arranging the lieutenants of artillery to the most convenient stations for immediate duty, attention has not been paid in all cases by the board of officers to equal promotion, which must be a subject of future orders.

E.

HEADQUARTERS OF THE ARMY,
Washington, April 26, 1837.

SIR: I have presented my claim to the Secretary of War, for the difference between the pay and emoluments of brigadier general and major general by brevet, during the time I was in command of the engineer department, viz.: from the 1st of June, 1821, to the 23d of May, 1828, which claim was before Congress and returned by the House of Representatives, with the declaration that it was in the power of the executive officers of the War Department and the accounting officers of the Treasury to decide on the account, and directed it to be referred to the Secretary of War, *to be adjusted on the same principles that officers under similar circumstances had been settled with.*

The Secretary of War has requested me to furnish him with evidences of officers under similar circumstances having been settled with, and I have to request that you will be good enough to state the circumstances under which the accounts of the following officers, for brevet pay, were settled; all of which I consider to be similar cases to mine.

1st. Major Totten, of the corps of engineers, having the brevet rank of lieutenant colonel, was allowed the pay of lieutenant colonel by President Monroe, because he was president of the Board of Engineers, having under his command two or more majors as members of that

board, from 1st of May, 1819, to 31st of October, 1822. Afterwards the brevet pay as lieutenant colonel was continued to him, and now as brevet colonel, because he has under his command a force in officers, mechanics, and laborers, deemed equal to the command of a colonel, and that allowance is continued.

2d case. Captain De Russy, of the corps of engineers, major by brevet, received, while superintending the fortifications in the harbor of New York, the pay and allowance of a major from 1st October to 31st December, 1825, because he had under his command a numerical force of officers, mechanics, and laborers, equal to the command of a major, allowed by the decision of the Secretary of War, Mr. Barbour, 8th January, 1827, and continued.

3d case. Topographical Engineer Brevet Major Abert, lieutenant colonel by brevet, being in charge of the Topographical Bureau, was allowed by the decision of Mr. Secretary of War Barbour, his brevet pay as lieutenant colonel, because he had charge of that bureau and the command of all the officers of Topographical Engineers and their assistants.

These cases I deem sufficient to establish the fact that officers under similar circumstances with me, as a brevet officer, have received their full allowance of brevet pay and emoluments, and are precedents for establishing my claim. I could cite other cases, but I presume these three will be sufficient to satisfy the Secretary of War, who desired to know what precedents or similar cases there were to justify the settlement of my account.

If this statement be found correct as to the brevet officers mentioned in the three cases above, you will oblige me to state on this paper, or on any other, that the facts accord with the accounts of those officers, as settled in the Second Auditor's office.

I have the honor to be, very respectfully, sir, your obedient servant,

ALEXANDER MACOMB,
Major General.

JAMES EAKIN, Esq.,
Acting Second Auditor of the Treasury.

TREASURY DEPARTMENT,
Second Comptroller's Office, April 29, 1837.

I have seen the original papers in the three cases before referred to, and on examination find that the facts in each case are correctly stated by General Macomb.

ALBION K. PARRIS.

F.

HEADQUARTERS OF THE ARMY,
Washington, June, 1837.

General Macomb begs leave to lay before the Secretary of War the following points to justify the settlement of his claim for his brevet pay, which now is before the Secretary of War for his decision:

1. It is proved that General Macomb was assigned to the command of the engineer department by the President of the United States in his capacity of major general, having under him the corps of engineers, the corps of topographical engineers, the Military Academy, and the civil engineers. This command was equal to that of any other brevet major general's in the army, both in importance and numerically.—(See General Order 17th May, 1821.)

2. Brevet Major Generals Gains, Scott, and Ripley, all received the full amount of their brevet pay, and General Macomb, who received his brevet rank for services in the war under circumstances similar to theirs, is the only officer with the brevet rank of major general who has not received his full pay as such.

3. A resolution of the House of Representatives was passed on General Macomb's presenting his claim before the Military Committee, stating that it was competent to the Secretary of War and the accounting officers to decide on the claim, and referred it back *to the Secretary of War, to be settled on the same principles that officers similarly situated were settled with.*—(See Resolution of the House of Representatives.)

4. Officers similarly situated had their accounts of a similar character adjusted before General Macomb's was presented, and since similar accounts have been settled by the decision of the Secretary of War, viz.: Colonels Totten and Thayer, of the engineers, Lieutenant Colonel Bomford, of the artillery, while at the head of the ordnance department, before the present department was organized, was a lieutenant colonel of artillery, and received his brevet pay as full colonel, his command consisting of artillery officers acting in the ordnance and mechanics and laborers. Lieutenant Colonel Abert, of the topographical, Majors De Russy and Smith, of the corps of engineers. All these officers had commands similar to that of General Macomb, and most of them—indeed, all of them, were under his immediate command, except Colonel Bomford. There was also Brigadier General Barnard under his command.

5. The justice, equity, and legality of the claim have never been denied; but as the command was not in *the line of the army* it has made the difficulty with the accounting officers, as provision by regulation has alone been made for commanders in the line, while officers out of the line, however distinguished by the rewards of brevets conferred, have to look to the justice of the Secretary of War to decide on their cases, and separately to authorize the settlement of their claims.

The law says, when a brevet officer has a command "*according*" to his brevet rank he shall be entitled to his brevet pay. The word "*according*" admits of great latitude of interpretation, and is indefinite, so that the Secretary of War is at liberty to decide according to the resolution of the House of Representatives, and, in the case of Major General Macomb, direct the adjustment of his accounts on the same principles as other officers' accounts under similar circumstances have been adjusted and settled.

ALEXANDER MACOMB,
Major General.

C.

TWENTY-THIRD CONGRESS—FIRST SESSION.

CONGRESS OF THE UNITED STATES.

IN THE HOUSE OF REPRESENTATIVES.—JANUARY 8, 1834.

Mr. RICHARD M. JOHNSON, for the Committee on Military Affairs,
made the following

REPORT.

*The Committee on Military Affairs, to whom was referred the petition
of General Alexander Macomb, report:*

That the petitioner claims certain allowances of pay under his brevet rank as major general, which have never been allowed to him, but which, he alleges, have been allowed to others under similar circumstances, upon a fair construction of the laws regulating such matters. The committee do not conceive it to belong to them to undertake to give a construction to the laws on the subject of pay under brevet rank; that belongs to the accounting and executive officers of the War Department; and, if General Macomb is entitled to relief under those laws, it is competent for the Secretary of War to grant him such relief as others have received under similar circumstances. The committee ask leave to be discharged from the further consideration of the subject; and that the petition and papers be referred to the Secretary of War for adjustment upon the same principles that have regulated similar allowances to others—therefore,

Resolved, That the committee be discharged from the further consideration of the subject, and that all the papers be referred to the Secretary of War.

This report and resolution was read and adopted by the House of Representatives.

Attest:

W. S. FRANKLIN,
Clerk of the House of Representatives.

D.

Statement showing the number of persons employed under the direction of the Engineer Department on the several fortifications and objects of internal improvement.

	Officers of the corps of engineers.	Officers of the corps of Top'l Engs.	Assist' officers of the line of the army.	Overseers and clerks.	Professors, teachers, officers, and others.	Cadets.	Civil engineers, commiss'rs, superintendents, and agents.	Mechanics.	Laborers, boatmen, &c.	Soldiers.	Aggregate.
CORPS OF ENGINEERS.											
Fort Adams	3	.....	.....	7	.....	.....	.....	48	318	.....	376
Fort Hamilton	2	.....	.....	4	.....	.....	.....	55	159	.....	220
Fort Delaware	1	.....	.....	.....	.....	.....	.....	34	10	.....	45
Fort Monroe	2	.....	.....	10	.....	.....	.....	47	243	.....	302
Fort Calhoun	1	.....	.....	7	.....	.....	.....	12	76	.....	96
Fort Macon	1	.....	.....	2	.....	.....	.....	19	76	.....	98
Fort at Oak Island	2	.....	.....	8	.....	.....	.....	52	227	.....	289
Fort at Mobile Point	1	.....	.....	7	.....	.....	.....	28	309	.....	345
Fort Jackson	1	.....	.....	9	.....	.....	.....	22	218	.....	250
Fort Chef Menteur	3	.....	.....	.....	.....	.....	.....	12	100	.....	115
Fort Rigolets .....	.....	.....	.....	.....	.....	.....	.....	10	90	.....	100
Fort Bayou Bienvenue .....	.....	.....	.....	.....	.....	.....	.....	12	71	.....	83
Improving the harbor of Presque Isle	1	.....	.....	1	.....	.....	.....	5	20	.....	27
Building and repairing piers at Newcastle	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	1
Office of the Engineer department	2	.....	.....	.....	.....	.....	.....	.....	.....	.....	2
Board of engineers	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	1
At the Military Academy	4	.....	.....	.....	.....	.....	.....	.....	.....	.....	4
Aid to General Brown	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	1
On furlough	1	.....	.....	.....	.....	.....	.....	.....	.....	.....	1
	28	.....	.....	55	.....	.....	.....	356	1,917	.....	2,356
TOPOGRAPHICAL ENGINEERS.											
On surveys in relation to roads and canals in Maine, Vermont, and New Hampshire .....	.....	1	7	.....	.....	.....	.....	.....	25	.....	33
On surveys with a view to the improvement of certain harbors in Massachusetts and Connecticut, &c. ....	.....	1	2	.....	.....	.....	.....	.....	5	.....	8
On surveys in relation to roads and canals in Ohio and Pennsylvania .....	.....	1	7	.....	.....	.....	.....	.....	21	.....	29
On surveys in relation to roads and canals in Virginia .....	.....	1	7	.....	.....	.....	.....	.....	19	.....	27
On surveys in North Carolina .....	.....	1	3	.....	.....	.....	.....	.....	10	.....	14
Survey with a view to a canal in Florida .....	.....	1	7	.....	.....	.....	.....	.....	54	.....	62
Examining a route for a road from Zanesville, Ohio, to Florence, Ala. ....	.....	1	2	.....	.....	.....	.....	.....	.....	.....	3
In Topographical Bureau at Washington .....	.....	1	1	.....	.....	.....	.....	.....	.....	.....	2
With board of internal improvement .....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	1
On furlough .....	.....	1	.....	.....	.....	.....	.....	.....	.....	.....	1
	.....	10	36	.....	.....	.....	.....	.....	134	.....	180
CIVIL ENGINEERS, COMMISSIONERS OF ROADS, SUPERINTENDENTS AND AGENTS.											
Repairing Fort Constitution .....	.....	.....	.....	.....	.....	.....	1	10	6	.....	17
Preservation of islands in Boston harbor .....	.....	.....	.....	.....	.....	.....	1	25	16	.....	42
Repairing Plymouth beach, Mass. ....	.....	.....	.....	.....	.....	.....	1	1	20	.....	22
Repairing Fort Washington .....	.....	.....	.....	.....	.....	.....	1	4	.....	.....	5
Improving the harbor of Mobile .....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....	1
Improving the harbor of Ashtabula, Ohio .....	.....	.....	.....	.....	.....	.....	2	.....	25	.....	27
Removing obstructions at the mouth of Grand river .....	.....	.....	.....	.....	.....	.....	1	4	15	.....	20
Removing obstructions in Huron river .....	.....	.....	.....	.....	.....	.....	2	8	18	.....	28
Removing obstructions at the mouth of Cunningham creek .....	.....	.....	.....	.....	.....	.....	1	.....	25	.....	26
Building piers at the mouth of Oswego harbor .....	.....	.....	.....	.....	.....	.....	1	10	30	.....	41
Building piers at Buffalo creek, N. Y. ....	.....	.....	.....	.....	.....	.....	1	10	20	.....	31
Building a pier at Steele's Ledge, Belfast, Me. ....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....	1
Improving the harbor of Sackett's Harbor .....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....	1
Building a pier at Dunkirk harbor, N. Y. ....	.....	.....	.....	.....	.....	.....	1	.....	30	.....	31
Improving Cleveland harbor, Ohio .....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....	1

STATEMENT—Continued.

	Officers of the corps of engineers.	Officers of the corps of Top'l Engs.	Assis't officers of the line of the army.	Overseers and clerks.	Professors, teachers, officers, and others.	Cadets.	Civil engineers, com- miss'rs, superinten- dents, and agents.	Mechanics.	Laborers, boatmen, &c.	Soldiers.	Aggregate.
Completing a pier at the entrance of La Plaisance bay.....							1	.....	.....	.....	1
Survey in Indiana in relation to canals							5	.....	16	.....	21
Survey in Maryland and District of Columbia in relation to canals							6	.....	12	.....	18
Continuation of the Cumberland road							76	107	1,122	.....	1,305
Surveying and locating Cumberland road							1	.....	6	.....	7
Repairing the old Cumberland road.....							1	.....	.....	.....	1
Survey with a view to a connexion of the Ten- nessee with the waters of the Alabama.....							2	.....	8	.....	10
Making a road from Detroit to Chicago.							1	.....	75	.....	76
Making a road from Miami to Detroit.....							1	.....	75	.....	76
Making a road from Detroit to Fort Gratiot.....							3	.....	10	.....	13
Making a road from Detroit to Saginaw.....							3	.....	10	.....	13
Improving the navigation of the Ohio and Mis- sissippi rivers							1	.....	100	.....	101
Removing obstructions in the Ohio river.....							1	.....	100	.....	101
							119	179	1,739	.....	2,037
PROFESSORS, CADETS, ETC.											
At the Military Academy, West Point.....					28	250	..	.....	.....	95	373

RECAPITULATION.

	Officers of the corps of engineers.	Officers of the corps of Top'l Engs.	Assis't officers of the line of the army.	Overseers and clerks.	Professors, teachers, officers, and others.	Cadets.	Civil engineers, com- miss'rs, superinten- dents, and agents.	Mechanics.	Laborers, boatmen, &c.	Soldiers.	Aggregate.
Corps of engineers.....	28	.....	.....	55	.....	.....	.....	356	1,917	.....	2,356
Topographical Engineers .....	.....	10	36	.....	.....	.....	.....	.....	134	.....	180
Civil engineers, commissioners, superintend- ents, &c .....	.....	.....	.....	.....	.....	.....	119	179	1,739	.....	2,037
Military Academy.....	.....	.....	.....	.....	28	250	.....	.....	.....	95	373
	28	10	36	55	28	250	119	535	3,790	95	4,946

Extracted from the reports on file in the Engineer department.

BENJ. FOWLER, Clerk.

On the reduction of the army in 1821, General Macomb was retained with the rank of colonel and the brevet rank of major general. In May, 1821, he was assigned to the command of the corps of engineers—the Topographical Engineers—the Military Academy, and a large force of civil engineers, artisans and laborers, employed upon different military works, and held and exercised this command from June 1, 1821, until May 3, 1828. His command consisted of four distinct corps, and numbered nearly 5,000 men; while the proper command of a major general is a division, consisting of four regiments. It is the rational, and has long been the settled construction, and is in accordance with the precedents, that in case of staff and engineer officers, it is not necessary that their command should be composed of troops organized into regiments and companies, to entitle them to the pay and emoluments of the brevet rank; that both in number of corps, in numerical force, and in the extent of territory embraced by it, the command of General Macomb equalled that of a major general, and equalled, if it did not exceed, that of any officer who actually exercised the command and received the pay of a major general at that time; that under the act of Congress of April 16, 1818, entitled “An act regulating the pay and emoluments of brevet officers,” section 1, General Macomb was entitled to the full pay of a major general for the period of his aforesaid command; that although the senior of others who received the same brevet rank, and exercising a command equal, if not superior to theirs in importance, numbers, and extent of territory, General Macomb was the only officer who received the rank of brevet major general for services in the war of 1812 who did not also receive the pay and emoluments of that rank; that in 1827 General Macomb presented to the Secretary of War a claim for the difference between the pay of brigadier general, which had been allowed him, and that of major general, from the date of his appointment to his aforesaid command; that failing to get the claim allowed by the Secretary of War or Comptroller of the Treasury, he applied to Congress at the 2d session of the twenty-second Congress; that in 1834, by a resolution of the House of Representatives, it was referred to the Secretary of War, who was proceeding to act upon it, when the President directed all accounts of the kind to be referred to Congress; that at the 2d session of the twenty-fifth Congress said claim was passed in the House of Representatives, and rejected in the Senate; that General Macomb continued to urge it upon the War Department, without success, until his death.

Amount, \$13,573 17.

IN THE COURT OF CLAIMS.

No. 507.—RUFUS L. BAKER *vs.* THE UNITED STATES.*Adopted in the case of Harriet B. Macomb.*

BRIEF OF THE DEPUTY SOLICITOR FOR THE UNITED STATES.

This is a claim for brevet pay.

The petitioner held, during the whole or the greater part of the period embraced by this claim, two commissions, by one of which the President did *appoint him captain of ordnance in the service of the United States*, and by the other did *confer on him the rank of major by brevet in the army of the United States*. (See copies of his commissions.)

The act "regulating the pay and emoluments of brevet officers," approved April 16, 1818, enacts, "that officers of the army who have brevet commissions shall be entitled to and receive the pay and emolument of their brevet rank when on duty, and having a command according to their brevet rank, and at no other time."

The petitioner alleges that he was on duty, and had a command according to his brevet rank, from the 1st of May, 1828, to the 31st of October, 1834; that during this period he (Baker) was not permitted to receive the pay of his brevet rank.

The command held by the petitioner during the period in question was that of Allegheny arsenal, a military establishment belonging to the Ordnance department, and at which there were employed during the period charged for a number of men, varying from 62 to 83, some of whom may have been enlisted men, and others were ordinary hired men employed by the day or month under contract.—(Report of Ordnance department, December 12, 1857.)

For the United States it is contended, that in order to entitle the petitioner to recover, he must have fulfilled two conditions under the act of 1818:

- 1st. He must have been on duty according to his brevet rank; and
- 2d. He must have had a command according to his brevet rank.

And it is also contended that he fulfilled neither of these conditions.

Of rank as distinguished from office.

In the military establishment officers generally, but not always, have rank.

Military storekeepers (keepers of military stores) are commissioned officers, and form part of the military establishment, (act March 2, 1821, chap. 13, sec. 9, 3 Stat. 615,) and are amenable to the rules and articles of war, (art. 36,) yet have no rank. Paymasters in the army were without rank until it was conferred upon them by the act of March 3, 1847, chap. 61, sec. 13, (9 Stat., 184;) and medical officers first received rank by the act of February 1, 1847, chap. 8, sec. 8, (9 Stat., 123.)

Rank is generally annexed to the office. The adjutant general, commissary general, paymaster general, and surveyor general have the rank of colonel; the quartermaster general has the rank of brigadier general. But rank may depend upon the duties performed, as under the act of March 3, 1813, chap. 52, secs. 1 and 2, (2 Stat., 819,) eight quartermaster generals were appointed, of whom the one "attached to the principal army" was to rank as a brigadier general, the others as colonels.

This distinction is presented by the two commissions in this case: the one *appoints*; the other *confers rank*.

Of brevet rank as distinguished from other rank.

The army of the United States consists of a fixed number of officers and men constituting an organization, which will be found detailed in every annual Army Register.

The number of these officers cannot be increased without law; each holds an office, and his commission expresses the office which he holds.

To each of these offices is generally attached a certain rank, sometimes expressed in the title of the office, as colonel of the engineers; and sometimes separately given by law, as adjutant general with the rank of colonel.—(Act of March 2, 1821, sec. 6, 3 Stat., 615.)

Besides the commissions which confer offices, with the rank attached thereto, the President can confer upon such officers additional commissions which confer rank only. Such additional commissions are styled brevet commissions. Thus, the late Adjutant General Jones held the office of adjutant general with the rank of colonel, in his own department, attached thereto, and at the same time he held by brevet the rank of major general in the army.

These brevet commissions are not limited in number by law, as are those commissions which confer places in the organization of the army; but may be multiplied to any extent by the joint action of the President and the Senate under the acts of July 6, 1812, chap. 137, sec. 4, (2 Stat., 784,) and April 16, 1818, chap. 64, sec. 2, (3 Stat., 427.)

A brevet commission is a commission "in the army," not in any particular regiment or corps of the army. All brevet commissions are of the same tenor. A captain of ordnance, a captain of engineers, a captain of infantry, and a captain of cavalry, if commissioned majors by brevet, receive the same commission—that of "major by brevet in the army of the United States." Their brevet commissions neither recognize, nor confirm, nor create any difference between them on account of their previous rank. By brevet they are all majors and majors only.

The brevet rank is army rank, as distinguished from rank in regiments or corps, is well illustrated by a comparison of art. 24, sec. 13, and art. 2, sec. 14, of the Articles of War, adopted by the continental Congress, September 20, 1776.—(1 Journals, 489.) The first cited article, speaking of rank, directs that officers having brevets take place on courts-martial composed of different corps according to their brevets. The last cited article, speaking of courts-martial, directs that officers of different corps or courts-martial take the same rank

which they hold *in the army*, Both provisions apply to the same state of facts, and are necessarily intended to be the same in sense; and the phrase *rank in the army*, used in the last, includes *brevet rank* as used in the first.

Of the incidents of brevet and other rank.

1st. *As to command.*—The commission by which an officer holds a place or “is mustered” in his own corps gives him, by its terms, the right to command in that corps; out of the corps his rights are defined by statutes—that is to say, by the 62d Article of war as enacted in “An act for establishing rules and articles for the government of the armies of the United States, approved April 10, 1806,” (2 Stat., 359,) which is in the following words:

“ART. 62. If upon marches, guards, or in quarters, different corps of the army shall happen to join and do duty together, the officer highest in rank in the line of the army, marine corps, or militia, by commission there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President of the United States according to the nature of the case.”

A brevet commission entitles an officer to precedence and command in certain cases prescribed by one of the articles of war, which is in the following words:

“ART. 61. Officers having brevets or commissions of a prior date to those of the regiment in which they serve may take place in courts-martial, and on detachments, where composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such officers belong, they shall do duty and take rank, both in courts-martial and on detachments, which shall be composed of their own corps, according to the commissions by which they are mustered in the said corps.”

In art. 3, p. 16, of the edition of Army Regulations, revised by General Scott and published by the War Department in 1825, is found the following construction of this article:

“18. The terms regiment and corps, as used in the 61st article of war, will be considered as synonymous.”—(Decision of the President of the U. S., announced in orders, July 1, 1816.)

A brevet commission also renders an officer eligible, by the assignment of the President, to exercise command over permanently constituted bodies of troops, to the same extent as if such bodies were “detachments” within the above-cited articles of war. Thus, General Jesup being quartermaster general with the rank of brigadier general, and not as such invested with the command of troops, yet having a brevet commission as major general, commanded as major general, by assignment of the President, a separate army in Florida.

2d. *As to pay.*—A brevet commission does not of itself entitle an officer holding it to pay. It might and probably would be otherwise if the brevet commission conferred an office instead of rank merely.

The absence of pay was formerly so prominent a characteristic of

brevet rank that in James' Military Dictionary, the best extant, it is made the distinguishing ground of his definition, as follows:

"*Brevet rank* is a rank in the army higher than that for which pay is received. It gives precedence (where corps are brigaded) according to the date of the brevet commission.

"*The brevet*, a term used to express general promotion, by which a given number of officers are raised, from the rank of captain upwards, without any additional pay, until they reach the rank of major general, when, by a late regulation, they become entitled to a quarterly allowance."—(Edition of 1816.)

I find no act earlier than that of July 6, 1812, (2 Stat., 784,) giving brevet pay. So far as I can learn from the journals of the continental Congress, by the aid of the index, brevet pay was allowed only in exceptional cases, and brevets seem to have been conferred simply as honorable marks of distinction, as appears from the following resolutions, which are all that are pointed out in the index:

Resolution of April 30, 1778. (2 Journal, 532,) providing that brevets shall give no rank in the regiment, troop, or company, but only on detachments and courts-martial; nor shall they entitle officers to additional pay.

Resolution of January 13, 1779, (3 Journal, 182,) giving brevet rank to French volunteers about to return to France.

Resolution of February 13, 1779, (3 Journal, 200,) to the same effect.

Resolution of September 10, 1783, (4 Journal, 260,) informing the paymaster general that brevet commissions do not entitle to pay or emoluments, unless the same be expressed in the resolution granting such commissions.

For pay, then, brevet officers must look to statutory provisions and army regulations in accordance therewith.

Of the statutes granting brevet pay and regulations auxiliary thereto.

The provision, act of July 6, 1812, chapter 137, sec. 4, (2 Stat. 784,) respecting brevet pay, is as follows; "Nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to and receive the same pay and emoluments to which officers of the same grades are now or hereafter may be allowed by law."

The provision in the act of April 16, 1818, chap. 64, sec. 1, (3 Stat., 427,) is as follows:

"The officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty, and having a command according to their brevet rank, and at no other time."

The following regulations have been issued from time to time by the President, to give effect to the act of 1818, and are all that are found in the successive editions of General Regulations for the Army.

The first is taken from the edition of Army Regulations promul-

gated in 1820, page 125 ; but was made, as the date attached to it shows, immediately after the passage of the act in 1818.

[May 8, 1818. "Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank ; for example : a brevet captain must command a company ; a brevet major and a brevet lieutenant colonel a battalion ; a brevet colonel a regiment ; a brevet brigadier general a brigade ; a brevet major general a division."]

In the regulations of 1821 the same order, in the same words, is found in par, 18, of art. 71.

In the regulations of 1825, (revised by Major General Scott,) the provision on this subject is found in article 71, as follows :

"1124. Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank ; for example : a brevet captain must command a company ; a brevet major and a brevet lieutenant colonel a battalion ; a brevet colonel a regiment ; a brevet brigadier general a brigade ; a brevet major general a division."

In the edition of 1834 the regulation is as follows :

"Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments when on duty, under the following circumstances : a brevet captain when commanding a company ; a brevet major when commanding two companies or when acting as major of the regiment ; a brevet lieutenant colonel when commanding at least four companies or when acting as lieutenant colonel of the regiment ; a brevet colonel when commanding nine companies of artillery or ten of infantry or dragoons, or a mixed corps of ten companies, or when commanding a regiment ; a brevet brigadier general when commanding a brigade of not less than two regiments or twenty companies ; a brevet major general when commanding a division of four regiments or at least forty companies ; a brevet officer when assigned to a particular duty or command according to his brevet rank, although such command be not in the line, provided his brevet allowances are recognized in the order of assignment."

"To entitle officers to brevet allowances while acting as field officers of regiments according to their brevets, they must be recognized at general headquarters as being on such duty, and the fact announced accordingly in general orders."

In the edition of 1835 (p. 194) the regulation is identical with that just cited.

In the edition of 1841 the regulation is as follows :

"1255. Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments when *on duty and having a command* according to their brevet rank as follows :

"1. A brevet captain, when commanding a company.

"2. A brevet major, when commanding two companies or when on duty as major of the regiment.

"3. A brevet lieutenant colonel, when commanding at least four companies or when on duty as lieutenant colonel of the regiment.

"4. A brevet colonel, when commanding a regiment or at least two companies.

"5. A brevet brigadier general, when commanding a brigade of not less than two regiments or twenty companies.

"6. A brevet major general, when commanding a division of four regiments or at least forty companies.

"7. A *brevet* officer when assigned by the special order of the Secretary of War to a particular duty and command according to his brevet rank, although such command be not in the line: *provided* his brevet allowances are recognized in the order of assignment.

"1256. To entitle officers to *brevet* allowances while acting as field officers of regiments, according to their brevets, they must be recognized at general headquarters as being on such duty, and the fact announced accordingly in general orders."

In the last edition of regulations, issued January 1, 1857, the department gives a construction to the act of 1818, by par. 1176 and 1177, in the following words:

"1176. Officers are *on duty and have a command according to their brevet* rank only when assigned to their brevet rank by the President, with the appropriate actual command composed of different corps, or when serving on detachments composed of different corps with such appropriate command. But in the regiment, troop, or company to which officers belong, they do duty and draw pay according to the commissions by which they are mustered in their own corps.

"1177. The following are the appropriate commands to each grade:

"For a captain, at least a company.

"For a major, at least 2 companies.

"For a lieutenant colonel, at least 4 companies.

"For a colonel, at least 1 regiment or 10 companies.

"For a brigadier general, at least 2 regiments or 20 companies.

"For a major general, at least 4 regiments or 40 companies.

"For a lieutenant general, at least 8 regiments or 80 companies."

Of the construction of the act of 1818.

The early regulations in the foregoing series are often referred to as giving a construction to the act of 1818, and giving it a construction opposed to that for which I contend in this case.

The regulations in question may indicate the views of the then executive as to the construction of the statute, and may even in form seem to give it a construction, but such was not their purpose.

"The purpose of these regulations," [of 1818 and 1820,] says Mr. Attorney General Wirt, (1 Opinions, 549,) "then is merely to supply what positive legislation had wholly omitted, not to contradict it in anything which it had enacted."

The statutes had already designated the cases in which brevet officers would be on duty according to their brevet rank, but no statute had determined their commands. This was to be determined by regulations.

When then the regulations speaks only of certain commands necessary to entitle officers to brevet pay, we are not to understand that no other condition is to be fulfilled.

I am not aware that the point which I shall make has ever been ex-

pressly decided by the department. I cannot find that it has been. But even if the executive department had so decided, and if the decision had been acted upon ever since the passage of the act, that fact should not be suffered to control the judgment of this Court. Upon this point I rely upon the following language of the Supreme Court in *The United States vs. Freeman*, (3 How., 564,) in regard to claims for brevet pay under the act of 1818, and in which the construction which had been given by the executive departments to the act of 1818, from its passage down to the year 1846, was reversed. The Court said: "Though what has been differently done is binding upon the government and cannot be recalled to the pecuniary disadvantage of any officer who may have received brevet pay and emoluments not according to the act of 1818, *no erroneous practice under it, of however long standing, can justify the allowance of a claim contested by government in a suit contrary to the true meaning and intent of that act.*"

And the rule is equally applicable to the other side, for the same Court said, in the *United States vs. Dickson*, (15 Peters, 141:)

"The construction given to the laws by any department of the executive government is necessarily *ex parte* without the benefit of an opposing government in a suit where the very matter is in controversy; and when the construction is once given, there is no opportunity to question or revise it by those who are most interested in it as officers deriving their salary and emoluments therefrom, for they cannot bring the case to the test of a judicial decision. It is only when they are sued by the government for some supposed default or balance that they can assert their rights. Their acquiescence, therefore, is almost from a moral necessity when there is no choice but obedience as a matter of policy or duty. But it is not to be forgotten that ours is a government of laws and not of men; and that the judicial department has imposed upon it, by the Constitution, the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it. The present question, then, must be decided upon the same principles by which we ascertain the interpretation of all other laws: by the intention of the legislature as it is to be deduced from the language and the apparent object of the enactment," (pp. 161, 162.)

The act of 1818 requires that the brevet officer be on duty according to his brevet rank.

The claimant denies that this condition is imposed by the act, and contends that the act requires the brevet officer to be "on duty" simply without further qualification. He reads the act as requiring that the brevet officer have a command according to his brevet rank, and also that he be on duty.

The answer to this is, that all officers who have a command are on duty; no officer commands who is off duty; and therefore the condition that the officer have a command includes the condition that he be on duty; so that the construction contended for by the claimant makes surplusage of the words "on duty," and allows but one con-

dition where the statute purports to make two. This is contrary to the established rules of construction, and cannot be allowed, if it may be avoided, by any other reasonable construction.

On the other hand, the construction I contend for gives a special effect to the words in question. An officer may be on duty according to his brevet rank and have no command; this is the case when he sits on courts-martial with officers of other corps; he takes place according to his brevet rank under the 61st article of war—but has no command. An officer may have a command according to his brevet rank and not be on duty according to his brevet rank; a major having the brevet rank of colonel may, in the absence of his superior officers, command his own regiment; he has a command according to the rank of a colonel, but, being in his own corps under the 61st article of war, must do duty only according to the commission by which he is mustered therein—that of major; he commands the regiment because, as major, he is superior in rank to every other person in it; not because he is doing duty in his rank of colonel.

Each of these conditions applies to a state of facts of frequent occurrence. Brevet officers are daily sitting upon courts-martial composed of officers of different corps; and brevet officers daily find themselves in commands belonging to the higher officers of their own regiments. Congress may well be supposed to have contemplated this notorious state of facts, and to have intended to deny brevet pay to any officer who fulfilled but one of these conditions, and to give it to those only who fulfilled both. I maintain that Congress has used apt words to express that intention.

Again, the expression used in this act is almost identical in terms, and is identical in sense, with the expression used in the 61st article of war. When, in that article, a captain is directed to “do duty and take rank according to the commission by which he is mustered,” no one has ever doubted that the injunction is to do duty *as captain*; that the intent is not simply to command him to do duty, to be busy, not to be idle, but to prescribe the rank in which he shall do duty. The purpose of the article is not to guard against idleness, but to determine rank. So, in the act of 1818, I contend that the same expression is not meant simply to prohibit idle men—men not on duty—from getting brevet pay, but to determine the grade in which they must be serving in order to entitle them to pay.

The petitioner was not on duty according to his brevet rank.

While officers are serving in their own regiments or corps—in which case, under the 61st article of war, they “do duty and take rank * * * according to the commissions by which they are mustered in the said corps”—such officers cannot fulfil the conditions imposed by the act of April 16, 1818.

In other words: the petitioner, while *doing duty and taking rank according to the commission of captain by which he was mustered in the ordnance corps*, could not at the same time be *on duty and having a command according to his brevet rank of major in the army*.

To do duty is to perform certain official acts; to exercise the func-

tions of an office ; and the acts which the petitioner did by virtue of his commission as captain, he could not have done by virtue of his commission as major.

The petitioner had not a command according to his brevet rank.

The second condition required by the act to entitle an officer to brevet pay is, that he must have had a command according to his brevet rank. The petitioner must show that he had a command according to the brevet rank of major. He shows that he was in command of Alleghany arsenal, and produces written opinions of high officers to the effect that this was equal to the command of a major of ordnance. Among these officers was the Secretary of War, Mr. Poinsett, who allowed him brevet pay for the same species of service from and after the 1st of August, 1837; but while expressing the opinion that he was equally entitled to it for the preceding period, declined to order payment.

In considering what is the command appropriate to a given rank, we must look beyond the naked rank. Rank alone does not determine command ; if it did, all officers having the same rank would necessarily have the same appropriate command. But this is not the case. A paymaster has the same *rank* as a major of infantry, and a major of infantry has the same rank as major of engineers ; yet the appropriate command of one of these officers is not that of another. All have the same rank, but have not the same command.

If, then, the act of 1818 means to say that an officer, being by brevet a major, and having a command according to the rank of major, shall be entitled, &c., &c., it contains a latent ambiguity ; for there is no command according to the rank of major *qua major* ; or if there be, it is that of a major of infantry, according to the ruling of the Supreme Court in the case of *Wetmore vs. The United States*, (10 Peters, 647.) In that case, a paymaster being entitled to "the pay and emoluments of major," claimed those of major of cavalry ; but the Court said, (p. 655,) "when the law speaks of a *major*, the term is most naturally considered as having been used in reference to such officers of that rank, and of such regiments, actually being of the army or to the army as it exists ; and when it is used without *regimental designation implies a body of infantry ; this arm of defence having been the main body of modern armies.*" Thus, the claimant could derive no benefit from such a construction of the act as would require a command according to rank generally, not brevet rank specially.

But the act does require a command according to his *brevet* rank ; and what is the effect of this limitation ? If a soldier were asked what is the appropriate command of a colonel of infantry, he would say a regiment ; and if he were asked what is the appropriate command of the colonel of ordnance, he would say the ordnance corps. In each case he would look beyond the naked rank, and consider the description of force in which the rank is held. And so in this case must we. I maintain that the difference between the commissions of major by brevet in the army and major of ordnance is of the same

nature as the difference between the commission of major of infantry and major of ordnance; and that the condition of the act of 1818, requiring a command according to *brevet* rank, is as specific as if it had required a command in a certain *arm*. If this be so, the petitioner gains nothing by his attempt to show that his command was that of a major of ordnance, since he does not show that the commands of ordnance officers and brevet officers are the same.

How, then, should the appropriate commands of brevet officers be ascertained? I answer by statute, if statutes had been passed; and as the statutes are silent, then by the regulations of the President—the commander-in-chief of the army. That he has authority to assign duties to officers has been held by the Supreme Court in the case of *Gratiot vs. The United States*, (4 How., 80,) and in that case the Court said they had often held that army regulations have the force of law. And this mode of determining the commands of brevet officers was resorted to by the Supreme Court in the case of *United States vs. Freeman*, (3 Howard, 564,) where the Court held generally (p. 566) that officers were entitled to brevet pay when exercising command according to the provisions of the regulations in force from time to time. The case came up on a certificate of division from the circuit court of the United States for the district of Massachusetts; and the district court, in proceeding, after having received the answers of the Supreme Court, ruled as follows: (*United States vs. Freeman*, 1 W. and M., 45.)

“The act of April 16, 1818, ch. 64, 3 Stat., 427, on which the claim depends, requires that brevet officers, in order to receive pay as such, must be then on duty, and having a command according to their brevet rank, and at no other time.

“What, then, constitutes a command according to their brevet rank?

“By the Army Regulations of 1825, which governed this question till 1836, (3 How., 564,) it was provided that a lieutenant colonel by brevet must be considered to exercise a command equal to his brevet rank when he commanded a battalion.

“We entertain an opinion that whatever meaning may at times be affixed to the word *battalion*, it must by the spirit of this regulation, and the laws connected with it, be construed to mean here, at least, two organized companies, with their requisite officers as well as men.

* * * * *

“In 1836 a new order was issued by the War Department requiring a still larger command for a brevet lieutenant colonel, in order to entitle him to extra pay, as ‘four companies instead of two,’ or to command as lieutenant colonel of a regiment. A like construction must be given to the word *company* here, in order to come within the spirit and reason of the allowance. It should be an organized company, and have a suitable number of officers as well as men.”

Both the courts recognize the authority of the department to determine the command of a brevet officer, and they refer to the regulations alone to determine the command in the case before them. Both courts cite regulations enlarging or varying the commands of brevet officers. The Regulations of 1836, says the district court, required a larger

command than the Regulations of 1825, for a brevet lieutenant colonel; but if commands of brevet officers are to be determined by reference to commands in regiments or corps, how could the former be enlarged or diminished without varying the latter? How could the appropriate command of a brevet lieutenant colonel be at one time two companies, and at another four, when a lieutenant colonel's command in the line remained the same at both periods?

We must look, then, to regulation alone, in the absence of statute, to determine the amount and description of force which constitute the appropriate command of brevet officers. The regulation in force during the period covered by this claim was that above cited from the edition of Army Regulations of 1825, revised by Major General Scott, and it determines the appropriate command of a brevet major to be a battalion. There is no pretence that the petitioner had command of a battalion; all that is shown is, that the average number of men under his direction, from 1828 to 1834, was ninety, exceeding the number in a company, but not equal to two companies, still less to a battalion, (see report from the Ordnance office of February, 1838;) nor were they organized as a battalion, nor could they have been, as some were hired men on daily wages, (report of December 12, 1857.)

But the claimant not only fails to show not only that he had the command presented for the brevet rank of major, he fails even to show by *competent evidence* that the command he had was equal to, or appropriate to, or according to, the rank of major in the ordnance corps, or in any corps.

He produces nothing on this point but the certificate of Mr. Secretary Poinsett, which affirms that Major Baker's command was equal in its importance, as well as in its numerical force and responsibility, to the command of a major of ordnance.

Importance and responsibility are subjects of opinion and judgment. They are incorporeal qualities, and no one will pretend that they form any part of the elements of a command. A company is but a captain's command, whether it guard the pass of a Thermopylæ, or parade in the park on a gala day. The only tangible portion of the allegation is as to the numerical force; this force is shown by evidence, not before Mr. Poinsett, to have been partly composed of hired, not enlisted men, and it is a question of law, not to be determined by evidence, whether such hired men can constitute a command. The case above cited from 1 W. & M. determines that they cannot. Moreover, the only proper way to prove the equality of numerical force would be to state what numerical force a major of ordnance appropriately commands, and then to prove that the claimant commanded such a force. Mr. Poinsett states neither the appropriate command of a major of ordnance nor the actual command of the claimant. It states only a conclusion which is incapable of being contradicted.

Of the mischiefs which the act of 1818 was intended to remedy.

To attempt to regulate pay according to the comparative importance of the duties performed instead of the command held, would introduce a thousand changing elements into the determination of the

question, instead of the simple and invariable rule contemplated by the act of 1818—that is, the description of the military body under the officer's command. It would introduce a mode of determination infinitely less reliable, and much more subject to abuse, than that which existed before the act of 1818 was passed, and which, on account of the abuses practiced under it was superseded.

The 9th section of the act of July 6, 1812, gave brevet pay to officers commanding separate posts, districts, or detachments. Under this act, says Mr. Attorney General Wirt in his opinion of December 29, 1821, (1 Opinions, 525,) “separate posts and districts were created and multiplied, as if to open a wide theatre for its more extensive operation; and there were few, if any, brevets in the army which did not draw brevet pay.” And so says Mr. Berrien in his opinion of July 18, 1829, (2 Opinions, 231.) The President, under the act of 1812, “had thus the power, in the arrangement and distribution of the army, to increase the amount of brevet pay by multiplying the number of separate posts. In point of fact, I understand that shortly after the termination of the late war, this power was freely resorted to as a means at the disposal of the Executive by which merit might be rewarded.”

If this was the mischief to be remedied, it requires no argument to show that the construction which the claimant seeks to place upon the act of 1818 will not affect the object. Even under the act of 1812 some limit was imposed on the liberality of the Executive, by restricting the allowance of brevet pay to officers having certain defined military commands; but the construction contended for includes all these commands, (because all posts, districts, and detachments, may be deemed important commands,) and it includes, besides, all other employments which, in the opinion of a liberal Secretary of War, may be deemed to be commands, and to be of a certain degree of importance—such as the charge of a survey, the construction of a fort, or the building of an aqueduct—officers so employed have often drawn brevet pay.

In the foregoing view of the questions involved in this case I have referred to no decisions of the War Department, or opinions of the Attorneys General upon individual cases. The decisions of the former depend greatly on the notions of liberality entertained by the Secretary for the time being, or on the personal merits of the claimant; and the series is therefore too contradictory to be cited here as authority, while the opinions of the Attorneys General are equally unreliable, since they concern questions which, Mr. Wirt said, (1 Opinions, 547,) “do not depend on positive law only, but call for an intimate knowledge of army regulations and organization which constitutes no part of the service of my profession.” In regard to the opinions of Attorneys General, I will only say that I have found no opinion which acknowledges any other guide or rule in the determination of questions of command than the statutes and army regulations.

JNO. D. MCPHERSON,
Deputy Solicitor.

COURT OF CLAIMS.

JUNE 6, 1859.

HARRIET B. MACOMB, Administratrix of ALEXANDER MACOMB, deceased,
vs. THE UNITED STATES.

BLACKFORD, J., delivered the opinion of the Court.

This case is similar in principle to that of Rufus L. Baker *vs.* The United States, the opinion in which, adverse to the claim, has just been delivered. The opinion of the Court for the reasons given by a majority of the Court in said case of Mr. Baker is, that the claimant in the present case is not entitled to recover.

IN THE COURT OF CLAIMS.

JUNE 6, 1859.

RUFUS L. BAKER *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

This is a claim for the difference between the pay and emoluments of a captain of ordnance and those of a major by brevet, from the 1st of May, 1828, to the 31st of October, 1834. The amount claimed is not, in terms, stated in the petition.

The claimant was commissioned a captain of ordnance in the service of the United States on the 1st of June, 1832, to rank as such from the 30th of May of that year. Whilst he was such captain, to wit, on the 1st of September, 1829, the rank of major by brevet in the army of the United States was conferred on him, to rank as such from the 21st of May, 1827.

During the time for which this claim is made, viz: from the 1st of May, 1828, to the 31st of October, 1834, the claimant was a captain of ordnance, as aforesaid, and had the rank of a major by brevet, as aforesaid.

The question which this case presents is: was the claimant, under the circumstances of the case, entitled to the pay and emoluments of a major in the army at any time during the aforesaid period?

The act of Congress of 1818 on the subject is as follows:

“That officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty, and having a command according to their brevet rank, and at no other time.”—(3 Stat. at L., 427.)

The following army regulations of 1825, in force during said period, is as follows:

"Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank; for example, a brevet captain must command a company; a brevet major and a brevet lieutenant colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier general, a brigade; a brevet major general, a division."—(See 3 Howard, 559, 566.)

The above act of 1818 and said army regulation of 1825 govern this case. They show that, to establish this claim, the claimant must prove that during the period embraced by the claim he was on duty and had the command of a battalion in the army.

Now, what was the command of the claimant during said period? The following letters are the only evidence on the subject:

"ORDNANCE OFFICE,
"Washington, February 1, 1838.

"SIR: It appears from the records of this office that the number of officers and men composing your command at the Alleghany arsenal, during the several years herein stated, was as follows, viz:

"In the year 1828.....	62
1829.....	83
1830.....	61
1831.....	47
1832.....	50
1833.....	55
1834.....	55
1835.....	61
1836.....	117
1837.....	145

"And that a number estimated at the lowest at thirty men, and not included in the foregoing reports to this office, were likewise attached to your command during the years 1830, '31, '32, '33, '34, and '35, thus augmenting your command during the whole time to a force exceeding the command of a captain. The foregoing numbers vary in some respects from those stated in my letter to the Secretary of War of the 2d of January last, owing to the omission in that letter of the officers of your command.

"Very respectfully, &c.,

"G. BOMFORD,
"Colonel of Ordnance.

"Major R. L. BAKER."

"ORDNANCE OFFICE,
"Washington, December 12, 1857.

"SIR: I have to acknowledge your letter of the 11th instant, in relation to the number of men under the command of Major R. L. Baker, at Alleghany arsenal, in the years 1828 to 1837, both inclusive, and, in reply, have to state that the number of men reported in the letter alluded to by you from the colonel of ordnance to Major

Baker, of February 1, 1838, embraced all the persons under his orders, hired as well as enlisted.

“Respectfully, &c.,

“A. K. CRAIG,
“Colonel of Ordnance.

“JOHN D. MCPHERSON, Esq.,

“Deputy Solicitor Court of Claims, Washington.”

All that these letters show is, that during the years in question, namely, from 1828 to 1834, the claimant had a command at Alleghany arsenal; that the highest number of officers and men under his command there in any one of those years was ninety-one; that the number in the other years ranged from seventy-seven to eighty-five; that some of the men were enlisted and some hired, but how many of each kind is not stated.

There is nothing in those facts to show that the claimant had the command of a battalion during any part of said time.

A case somewhat similar to the present one occurred in the circuit court of the United States for the district of Massachusetts. The defendant, in a suit against him by the government, claimed the brevet pay of a lieutenant colonel. The court, in an opinion against the claim, said: “By the army regulations of 1825, which governed this question till 1836, (3 How., 564,) it was provided that a lieutenant colonel by brevet must be considered to exercise a command equal to his brevet rank when he commanded a battalion. We entertain an opinion that whatever meaning may, at times, be affixed to the word battalion, it must, by the spirit of this regulation and the laws connected with it, be construed to mean here, at least, two organized companies, with their requisite officers as well as men.”—(United States *vs.* Freeman, 1 Woodbury and Minot, 45.)

The claimant, to show that his command at said arsenal entitled him to the pay and emoluments claimed, relies on a decision of Mr. Poinsett, Secretary of War. That decision is copied into the petition. The main part of it is as follows:

“It appears that the command held by Major Baker from the year 1828 to the present time is one of the first importance in his corps, and fully equal, in its numerical force and responsibility, to the command of a major of ordnance; and accordingly the department sanctioned his application for the pay and allowances of his brevet rank from the 1st of August, 1837, but deemed it proper that a retrospective allowance, involving an amount not included in previous estimates and appropriations, should receive the sanction of Congress.”

We do not know what evidence was before Mr. Poinsett, and, of course, can form no opinion as to the correctness of his decision relative to the numerical force of the claimant's command. If, however, the Secretary means, by the word “responsibility,” anything in addition to numerical force, we think that he is, so far, mistaken. The claimant's responsibility, arising from the value of public property in his charge, cannot affect the case. The act of Congress of 1818, when speaking of a command according to brevet rank, means a command of men, not a care of public property; and the army regulation of

1825, when speaking of a command equal to brevet rank, means a command of men. And said act and regulation both mean a command of men belonging to the army.

The claimant's brevet rank did not, of itself, entitle him to the pay and emoluments of a major. Notwithstanding his brevet commission, he remained limited to the command and pay of a captain under his lineal commission until he should be assigned, by proper authority, to the command of a battalion in the army, and until, in consequence of such assignment, he should actually exercise that command, and then only for the time of its actual exercise.

But there is no evidence that the claimant, either with or without orders, ever commanded a battalion, that is, at least two organized companies. The whole number of officers and enlisted men and hired men under him during any of the time aforesaid did not exceed ninety-one; and, for aught that appears, two-thirds or more of the men may have been mere hired laborers for daily or monthly wages. It is impossible, therefore, from the evidence, to say that the claimant had under him, at any portion of the time referred to, any number of enlisted men which it was not his duty to command as a captain of ordnance.

It is objected by the solicitor that, at all events, there is no ground for this claim, because the claimant was acting in his own corps, but we have not found it necessary to examine that point.

It is the opinion of the Court that the claimant has no cause of action.

IN THE COURT OF CLAIMS

JUNE 6, 1859.

HARRIET B. MACOMB, administratrix, *vs.* THE UNITED STATES.

LORING, J.

General Macomb was major general by brevet, and colonel in the Corps of Engineers. He was, by general orders dated May 17, 1821, (exhibit B,) appointed, by his title of major general, to the command of the Engineer Corps, the Topographical Engineers, (in the same general orders attached to the Engineer Corps,) the Military Academy at West Point, and to a force of civil engineers, artisans, and laborers employed on different military works. He held this command from June 1, 1821, to May 23, 1828, and it consisted numerically of 4,946 men, of whom 4,325 were mechanics and laborers. General Macomb received for this command the pay and emoluments of a brigadier general; it is alleged that he was entitled to the pay and emoluments of his brevet rank of major general, and the claim is for the difference

between the pay of a brigadier general and of a major general for the time of service stated, and amounting to \$13,573 17, and interest.

It was contended by the deputy solicitor that General Macomb's command was in his own corps, and, therefore, was not according to his *brevet* rank. I am of opinion that this objection is sustained by the evidence, and is conclusive in this case and all like it.

The case is governed by the statute of April 16, 1818, entitled "An act regulating the pay and emoluments of brevet officers," and the first section of which is in these words: "That the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank, when on duty, and having a command according to their brevet rank, and at no other time."—(Sec. 1, 3 Stat., 427.)

I understand the purpose of this statute to be to give to officers having brevet rank its pay and emoluments when they are actually exercising that rank and at no other time. Such officers have two ranks, differing in degree and authority, and justice to them requires that they should be paid according to the rank and authority they are called upon to exercise. On the other hand, when such officers are exercising only that authority which is within the scope of their rank in their corps, which by that rank it would be their duty to exercise if they had not brevet commissions and for which their brevet commissions are not required, there is no reason that they should be paid according to such brevet commissions.

For this reason the law has always been that brevet commissions gave to officers no rank or command *in their own corps*.

The resolutions of the continental Congress, establishing rules and articles of war, September 20, 1776, art. 24, sec. 13, and April 30, 1778, art. 2, sec. 14, gave to brevet officers rank and command according to their brevet commissions when on courts-martial and commanding detachments composed of different corps, and excluded them from rank and command according to their brevet commissions in their own corps.

And the statute of April 10, 1806, c. 20, 2 Stat. at Large, 359, entitled "An act for establishing rules and articles for the government of the armies of the United States," enacts, in its 61st article, in relation to brevet officers, the rule which had always obtained, viz: "that in the regiment, troop, or company to which such officers belong, they shall do duty and take rank, both in courts-martial and on detachments, which shall be composed only of their own corps, according to the commissions by which they are mustered in the said corps."

Such was the nature and incident of brevet rank when the statute of April 16, 1818, was enacted; that statute does not define its phrase "*having a command according to their brevet ranks*," but it refers to that brevet rank as it was then moulded and shaped by law, and it adopts and enforces the rule that such rank gave to officers no command in their own corps, and so it has been authoritatively declared. Attorney General Berrien, 2 Op. 227, July 18, 1829, says: "The 61st article of the rules and articles of war still excludes the operation of the brevet in the regiment, troop, or company to which the brevetted officer belongs."

It is observable, too, that the act of 1806 was enacted after the Engineer Corps was established ; that its 63d article makes provision and rules for the Engineer Corps, and it cannot be claimed, therefore, that the 61st article of that act was not intended for or did not contemplate the Engineer Corps, which is peculiar in its organization and function ; the Engineer Corps, as much as any other corps, is within the terms and reason of the 61st article ; for the same justice which holds a senior captain in his regiment of infantry to do the duty of its colonel, may hold a colonel of Engineers to do the duty of a general in his own corps.

If the statute of April 10, 1818, referred to brevet rank as it then existed, the phrase "having a command according to their brevet rank" could not include the commands of officers in their own corps, for such commands did not then belong to, and therefore could not be "*according to*" their brevet rank.

Now, all the services of General Macomb, though unquestionably of the highest grade and importance, and of great extent and variety, are yet, as they are stated in the petition and shown in the evidence, directly within and peculiar to the line of his corps and his duty as its chief and colonel. He was, by the statutes of March 16, 1802, and April 29, 1812, the head of the Engineer Corps, and in superintendence of that and the Military Academy and of the bureau at the headquarters of the department, and the Topographical Engineers was a part of his corps, and so specified in general orders, (exhibit B,) and his duties are thus specified in the 67th article of the Army Regulations of 1820, 1821, and 1825, which cover the term of his service :

"1. The chief of the Corps of Engineers shall be stationed at the seat of government, and shall be charged with the superintendence of the Corps of Engineers, to which that of the Topographical Engineers is attached. He shall also be inspector of the Military Academy, and be charged with its correspondence.

"2. The duties of the Engineer Department will comprise the construction and repairs of fortifications and a general superintendence and inspection of the same," &c.

These specifications cover all the services shown in this case, and they show that such services were in the line of the corps of General Macomb, and within the scope of his commission, rank, and command in his own corps. If so, they were not rendered under his brevet rank, for that gave him no command in his own corps.

It is claimed for the petitioner that, as General Macomb was assigned to his command in his capacity and by his title and rank of major general by the authority of the President of the United States, his command was thereby authoritatively declared and made "*according to*" his brevet rank ; but such a command as specified in the statute of April 10, 1818, is a determinate thing and position, fixed by law, and not arbitrary with the President, for, if it were, he would control the statute, and might defeat its purpose. Beside, an officer may be assigned a command less than that of his rank ; a general may command a regiment ; a colonel may command only a battalion. Each will be *on duty* according to his rank, but neither will have a command "*according to*" his rank, in the sense of the statute of 1818.

It is contended for the petitioner that General Macomb, upon the facts stated, exercised a command numerically "*equal to*" his brevet rank, and is therefore entitled to his brevet pay under the statute of 1818, as that was expounded by the Army Regulations of 1820 and 1821 and 1825, &c., in these words: "Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command *equal to* their brevet rank: *for example*, a brevet captain must command a company; a brevet major and a brevet lieutenant colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier general, a brigade; a brevet major general, a division." And in the argument it was urged that the words "*equal to*" and "*for example*" show that a major general's command is to be *equivalent* to a division only, and that the word *division* is used not as an absolute requirement, but only as an illustration as to quantity.

But the Army Regulations cannot alter the statute or dispense with any requirement the statute makes. The phrase "*according to their brevet rank*," in the literal meaning of its words, has no reference to numbers, and specifies none. It may include numbers if they are incident to a brevet rank, but it is not satisfied by numbers only if other things besides numbers are incident to such brevet rank; for, "*according to their brevet rank*," of its own force, means according to such rank *in all particulars*, and not in any one particular. If a captain with a brevet of major was in command of his own regiment, his command would be, in numbers, more than "*equal to*" his brevet rank, and exceed the "*example*" given in the Army Regulations; but still it would not be "*according to*" his brevet rank, for such a rank cannot give a command in his own corps, under the statute of 1806, article 61.

Beside, from the nature of the subject-matter and the purpose of the Army Regulations, it may well be assumed that they used the technical words, company, battalion, regiment, brigade, and division, in their technical meaning, and contemplated only organized bodies of soldiers in the application of the words "*equal to*." In reference to such soldiers, the relative duties and responsibilities of officers are fixed by law, and are entirely different from what they are in reference to mechanics and laborers hired and not enlisted; these are not soldiers, and therefore are not in strictness a part of a military command. Their obligation arises on their contract, and is according to that only. There is no law or army regulation apportioning them, in numbers, to different military commands, or furnishing any suggestion or reason that a colonel of engineers may not as well command 5,000 of them on different works as a major general; admitting, therefore, that in the Army Regulations of 1820, 1821, and 1825, &c., the words division, brigade, &c., have reference to numbers, such reference is, I think, to numbers as organized and described under the terms used, and is not to mechanics and laborers hired and not enlisted. I am of opinion, therefore, that General Macomb had not a command "*equal to*" a "*division*," as those words are used in the Army Regulations.

It may be, and undoubtedly is the fact, that mechanics and laborers more frequently and in larger numbers enter into the commands of officers of the engineer and ordnance corps than into the commands

of the officers of other corps of the army. This fact might justify a different provision for the former, but it cannot authorize this court to construe the same words in the laws and army regulations differently for officers of the different corps.

The evidence in this case shows that, by the practice of the department at the time General Macomb was in his command, mechanics and laborers were counted in estimating numerically military commands; that other officers holding brevet commissions and in command in similar circumstances at and about the same time were paid according to their brevet rank; and that of all the major generals brevetted when and for the same meritorious services that he was, he is the only one who has not been paid as a major general.—(A. Secretary Cass' remarks, E F.) These circumstances may make a case of peculiar hardship, but its alleviation does not belong to this court, whose duty it is to declare the law only on the facts it finds.

On the whole case, I am of opinion that the command of General Macomb was not "*according to*" his brevet rank; and that, therefore, he is not entitled to the relief he prays.

Rep. C. C. 218—4

RULIF VAN BRUNT.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

RULIF VAN BRUNT *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's original evidence transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this fifth day of December,
[L. s.] A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

RULIF VAN BRUNT *vs.* THE UNITED STATES.

To the honorable the judges of the Court of Claims:

Your petitioner, Rulif Van Brunt, respectfully represents that he is a citizen of Schenectady county, in the State of New York, and in the year 1814 was a resident of Brooklyn, in the county of Kings and State of New York, and was the lessee of a certain lot of land in Brooklyn, aforesaid, from one John Jackson, of the same place, for the term of one year from the first day of April, 1814, to the first

day of April, 1815, at a rent of three hundred and twenty-five dollars per annum, which rent was duly paid to said John Jackson.

That your petitioner entered upon the said premises on the first day of April, 1814, and cultivated the same by putting in a crop of grain and vegetables.

That on the ninth day of August, 1814, the said premises were entered upon by the military authorities of the county, and, as he is informed, by the military raised under the charge of the committee called the "Committee of Defence" of the city of New York; and the said premises were occupied from and after the said 9th day of August, 1814, by the said military, until about the 3d day of December, 1814, and a fort called "Fort Green" was erected thereon, which was occupied by the military of the United States, and the whole premises and the crops grown and growing thereon were taken, appropriated, and destroyed by said committee, or by the military, or by those acting under their authority; and your petitioner thereby lost his entire crop, his labor, and the rent paid by him for the said premises; and was damaged thereby in the sum of ten hundred and fifty dollars.

Your petitioner further shows, that in the month of December, 1844, he applied to Congress for relief, and in the Senate on the 23d of December, 1844, the claim was referred to the Committee on Claims; March 3, 1846, referred to Committee on Claims; December 18, 1846, referred to Committee on Claims; December 13, 1847, referred to Committee on Claims; December 12, 1848, referred to Committee on Claims; January 7, 1850, referred to Committee on Military Affairs; January 22, 1850, adverse report; April 29, 1852, referred to Committee on Claims; June 9, B. S. 449, and report; February 2, 1854, referred to Committee on Claims; March 21, 1854, bill S. 290, and report; May 3, bill passed, authorizing the proper accounting officers of the Treasury Department to audit and adjust, upon principles of justice and equity, your petitioner's claim, and to pay the amount so found due, not exceeding the sum of seven hundred and fifty dollars.

Your petitioner also shows, that on the 10th of June, 1854, in the House of Representatives, the said bill was referred to the Committee on Claims; February 22, 1854, report adversely; March 3, 1855, referred by the House of Representatives to the Court of Claims. Your petitioner avers he is alone interested in the aforesaid claim.

Your petitioner, therefore, being remediless save in your honorable court, respectfully prays that your honors will take his case into consideration, and grant him the sum of ten hundred and fifty dollars, the amount of damage sustained by him, or so much thereof as he may satisfactorily prove to your honors he is entitled to for damage sustained by him, by reason of the occupancy of his lands and buildings, and appropriation and destruction of his crops by a military force in the service of the United States, and such further relief as may seem meet and proper in the premises. And, as in duty bound, your petitioner will ever pray, &c.

RULIF VAN BRUNT.

STATE OF NEW YORK, }
County of Schenectady, } *to wit:*

On this nineteenth day of March, A. D. 1856, before me, Stephen S. Riggs, a commissioner of deeds in and for the city of Schenectady, in the county and State aforesaid, personally appeared the above Rulif Van Brunt, and makes oath that the facts set forth in the above petition are true according to the best of his knowledge and belief.

S. S. RIGGS,
Commissioner of Deeds.

WILLIAM I. MARTIN,
 J. H. PETERS,
Attorneys for petitioner.

STATE OF NEW YORK, }
County of Schenectady, Clerk's Office, } *ss:*

I, Marvin Strong, clerk of the county of Schenectady, do hereby certify that S. S. Riggs, esq., before whom the foregoing affidavit was subscribed and sworn, was at the time of taking the same a commissioner of deeds in and for said county, duly commissioned and qualified as such; and that I am well acquainted with the handwriting of the said commissioner, and verily believe that the signature to said affidavit and signature is genuine.

In witness whereof, I have hereunto set my hand and affixed the [L. S.] seal of the said county this 19th day of March, 1856.

MARVIN STRONG, *Clerk.*

RULIF VAN BRUNT *vs.* THE UNITED STATES.

Schedule of evidence for the petitioner.

Deposition of Jeremiah Johnson.

Deposition of Samuel Doxsey.

Deposition of John Storm.

Deposition of Henry Reid.

Deposition of Samuel Ryder.

Agreement between John Jackson and claimant.

Deposition of claimant as to death and removal of witnesses.

To the solicitor of the United States for the Court of Claims.

The evidence for the petitioner is closed and above is a schedule thereto.

RULIF ^{his} + VAN BRUNT
 mark.

Witness: JNO. D. MCPHERSON.

STATE OF NEW YORK, *County of Kings,* *ss:*

Jeremiah Johnson, of the city of Brooklyn, in the county of Kings and State of New York, being duly sworn, doth depose and say: That he is now aged seventy-seven years; that he knew John Jackson, of

said city of Brooklyn, in his lifetime ; that he has examined the signature of John Jackson to the annexed lease or agreement ; that he has seen the said John Jackson write and is acquainted with his handwriting, and he verily believes that the signature to the annexed lease is in the proper handwriting of John Jackson, of Brooklyn, the owner of the premises in the said lease or agreement mentioned and referred to.

And this deponent further saith, that on the second day of September, in the year of our Lord one thousand eight hundred and fourteen, he was the brigadier general of the 22d brigade of the New York State infantry, and that the certificate made by this deponent and hereunto annexed is in all respects just and true.

JEREMIAH JOHNSON.

Sworn before me this 9th day of October, 1844.

JOHN VANDERBILT,

First Judge, &c., of Kings county, and a Justice of the Peace.

OCTOBER 8, 1844.

I certify that the 22d brigade of New York infantry, under my command, was ordered into the service of the United States and encamped at Fort Green, in the county of Kings, on the 2d day of September, 1814, on land then owned by John Jackson, which, with a house and barn, he had rented to Rulif Van Brunt; about half of the land whereon the fort was built, and the land whereon the brigade encamped, is included in the lease of Mr. Van Brunt. All the fence was removed from the land, and the produce of his labor destroyed before the 2d of September ; the dwelling-house was in the possession of a man named Turney, and the barn was occupied as a guard-house by my order, on the consent of John Jackson.

And I further certify that John B. Coles and John Morse, of the city of New York, and myself, appraised the damages sustained by John Jackson and several other person, occassioned by the occupation of their land for the public service and defence, and that the damage sustained by Mr. Van Brunt was not appraised by us.

JEREMIAH JOHNSON,

Brigadier General of New York Infantry.

KINGS COUNTY, ss :

Samuel Doxsey, of the city of Brooklyn, superintendent of the poor of Kings county, being duly sworn, doth depose and say: That he was a resident of the town (now city) of Brooklin during the years 1813-'14, and that he was acquainted with Rulif Van Brunt and with John Jackson. The said Rulif Van Brunt, in the year 1814, occupied a farm belonging to said John Jackson. The deponent has seen in the possession of the said Rulif Van Brunt an agreement for the letting of said farm, and that the deponent was well acquainted with the handwriting of the said John Jackson, and that the signature to said agreement is in the handwriting of the said John Jackson, as deponent verily believes ; and that sometime in the summer of 1814

the erection of fortification called Fort Green was commenced on the farm in the occupancy of said Van Brunt, by which the fences were thrown down and the farm turned into a common; and that in the first part of September in said year the deponent was ordered on duty in the 64th regiment of militia; and that said regiment, with others composing the brigade under the command of Brigadier General Jeremiah Johnson, encamped on the said farm, and occupied the barn as a guard-house, and used the straw, hay, and grain that was in said barn for the purpose of bedding, &c.; and that the said Van Brunt was compelled wholly to abandon said farm and procure a house for his family and stabling for his stock elsewhere. The deponent not being engaged in farming at that time is unable to make an estimate of the losses sustained by said Van Brunt, but feels confident that he suffered serious losses by reason of having to remove from said farm.

SAMUEL DOXSEY.

Sworn before me this 12th day of October, 1844.

JOHN VANDERBILT,
First Judge, &c.

Estimate of the damage sustained by Rulif Van Brunt by reason of the farm he occupied being taken for military purposes in the year 1814.

Rent of farm	\$385 00
Ten loads of oats.....	100 00
Seven acres of corn.....	175 00
Pasture, grass, &c.....	150 00
Seed and labor.....	150 00
	960 00

John Storm, of the city of Brooklyn, being duly sworn, doth depose and say that the above estimate was made by him, and that he was acquainted with Rulif Van Brunt, and with the facts and circumstances of the case at the time they occurred, being himself engaged in the same business, and residing near the said Rulif Van Brunt.

JOHN STORM.

Sworn before me this 12th day of October, 1844.

JOHN VANDERBILT,
First Judge, &c.

Estimate of the damage sustained by Rulif Van Brunt by reason of the farm he occupied being taken for military purposes in the year 1814.

Rent.....	\$385
Ten loads of oats destroyed.....	100
Seven acres of corn on the ground.....	175
Pasture, grass, &c.....	200
Seed and labor.....	150
	1,010

KINGS COUNTY, ss:

Henry Reed, being duly sworn, doth depose and say that he made the above estimate, and that he considers the above amount justly due to said Rulif Van Brunt; and that he was acquainted with the facts and circumstances of the case at the time they occurred; and that he has subsequently occupied the same farm; and that he is well acquainted with Rulif Van Brunt, and with John Jackson; and that he has seen a lease or agreement in the possession of the said Rulif Van Brunt, which is in the handwriting of said John Jackson; and further this deponent saith not.

HENRY REID.

Sworn before me this 14th day of October, 1844.

JOHN VANDERBILT,
First Judge, &c.

KINGS COUNTY, ss:

Samuel Ryder, deing duly sworn, doth depose and say that he is acquainted with the circumstances attending the dispossession of Rulif Van Brunt from his premises, at Fort Green, in the year 1814, by the military under the command of General Jeremiah Johnson; and that, in his judgment, the said Van Brunt sustained damages to the amount of ten hundred and fifty dollars or thereabouts.

SAMUEL RYDER.

Sworn before me this 10th day of October, 1844.

JOHN VANDERBILT,
First Judge, &c.

Memorandum of agreement between John Jackson and Rulif Van Brunt:

Said Jackson lets and hires unto above said Van Brunt the house and barn, and the land Israel now has in possession, being about thirty acres, from the first of April, 1814, to the first of April 1815, all the ground to the north of the lane of Samuel Bouten, meeting the south lane of William Cornwell's land; the said Van Brunt is to plough the stalk ground and sow it with oats or barley, and seed it with clover, and plough one other lot for corn or market truck; said Van Brunt covenants and agrees to pay said Jackson three hundred and twenty-five dollars for the use of the same; eighty-one dollars and twenty-five cents on the first day of April, and the remainder in quarterly payments; the said Van Brunt is to remove no manure or thing from the place that belongs to it. I agree to six barrels cider for Mr. Van Brunt, and two barrels apples.

[L. s-] Witness our hands and seals, Brooklyn, February 16, 1814.

JOHN JACKSON.

N. B.—Mr. Borom has liberty to pass the north side with cart to the powder-house.

Received, Brooklyn April 1, 1814, from Mr. Rulif Van Brunt, eighty-one dollars and twenty-five cents for one quarter's rent of place he has hired of me, where Abraham lived.

JOHN JACKSON.

[\$81 25.]

Received from Mr. Rulif Van Brunt eighty-one dollars and twenty-five cents in full for half year's rent of place he lives on.

[\$81 25.]

JOHN JACKSON.

BROOKLYN, *July* 30, 1814.

RULIF VAN BRUNT *vs.* THE UNITED STATES.

I, Rulif Van Brunt, do depose and say that I have made diligent search and inquiry for the witnesses whose depositions are in evidence in the above-entitled cause, and have been informed and believe that Jeremiah Johnson and John Storm are dead ; that Henry Reid has become entirely imbecile and childish ; that Samuel Ryder removed many years since to some part of Virginia, and his residence is unknown ; and of Samuel Doxsey I can obtain no information whatever.

RULIF VAN BRUNT.

Sworn before me this 26th day of November, 1858.

SAM'L H. HUNTINGTON,

Chief Clerk Court of Claims.

To the honorable the Congress of the United States in Senate and House of Representatives :

Your petitioner, Rulif Van Brunt, now of Rochester, in the State of New York, respectfully sheweth—

That your petitioner in the year 1814 was a resident of Brooklyn, in the county of Kings and State of New York, and was the lessee of a certain lot of land in Brooklyn, aforesaid, from one John Jackson, of the same place, for the term of one year, to wit: from the first day of April, 1814, to the first day of April, 1815, at a rent of three hundred and twenty-five dollars, which rent was duly paid to said John Jackson.

That your petitioner entered upon the said premises on the first of April, 1814, and cultivated the same by putting in a crop of grain and vegetables.

That on the ninth day of August, 1814, the said premises were entered upon by the military authorities of the county, and, as he is informed, by the military raised under the charge of a committee called "the Committee of Defence" of the city of New York ; and the said premises were occupied from and after the said ninth day of August,

1814, by the said military, and a fort called "Fort Green" was erected thereon, and the whole premises and the crops grown and growing thereon were taken, appropriated, or destroyed by the said committee, or by the military, or by those acting under their authority, and your petitioner thereby lost his entire crop, his labor, and the rent paid therefor by him.

Your petitioner was informed at the time that the said committee of defence would attend to the settlement of his said claim, and would petition to Congress for relief for him and others whose property was appropriated in like manner; and he is informed and believes that some years ago an application for this purpose was made, and that the papers relating thereto were destroyed in the department at Washington some years ago.

Your petitioner has been unable to expend his earnings for a few years past to prosecute this claim for relief. He has still in his possession the original lease by which said premises were held, and is able to prove by living witnesses of the highest respectability the statement above set forth.

Your petitioner therefore prays that your honorable body would grant him relief in the premises by the passage of a law to reimburse to him the rent paid by him in 1814, with interest thereon, and the value of his crop and labor bestowed at the time it was so appropriated, with interest thereon; and your petitioner will ever pray, &c.

RULIF VAN BRUNT.

KINGS COUNTY, ss:

On this ninth day of October, 1844, personally appeared before me Rulif Van Brunt, to me known to be the person described in the above petition, and made oath that he has heard the above petition read and knows the contents thereof; that the statements made therein are true of his own knowledge, except as to those which are stated upon information and belief, and as to those statements he believes it to be true.

JOHN VANDERBILT,

*First Judge of Kings Co. Court, of Counsel in Sup. Court,
and a Justice of the Peace of said County.*

IN THE HOUSE OF REPRESENTATIVES, *July 22, 1854.*

Mr. EDGERTON, from the Committee of Claims, made the following report:

The Committee of Claims, to whom was referred Senate bill No. 290, "for the relief of Rulif Van Brunt," made the following report:

The committee have examined this case, and adopt, as their report upon it, an adverse report made at the 1st session of the 31st Congress, from the Committee on Military Affairs.

JANUARY 22, 1850.

The examination of the petition and vouchers in the case of R. Van Brunt's application for damages, has furnished the following facts and result:

The petitioner sets forth that in 1854 he was a resident of Brooklyn, New York; the lessee of 30 acres of land, at a rent charge of \$300 a year. That his premises in September were occupied by a military party, ordered out by the committee of defence of the city of New York. That in occupying, they destroyed his crops, &c., to the amount of \$1,000.

As evidence of the lease, the article of agreement is presented, well authenticated.

As evidence of the payment of rent to the lessor, the petitioner presents two receipts for \$81; each satisfying a half year's rent, terminating in July preceding the fall of the military occupation.

The petitioner presents no vouchers showing the payment of rent for the last half year within which period the damage accrued.

The petitioner shows, by proof, that at some period soon after the damage accrued—as the committee are left to conclude from the certificate of one of the witnesses—the damage was appraised, and for some mysterious reason the petitioner, although a severe sufferer, was overlooked.

All of the facts have brought the committee to the conclusion that if a claim ever did exist, it was a claim against the city or State of New York, and should have been presented for liquidation.

That from the fact that there is no evidence of the payment of rent for the last half year, and the fact that the lessor received assessment of damage for an injury done at the same place, at the same time, and by the same means, it is quite probable that the lessor and lessee adjusted the matter between them.

That the claim, as presented to the committee, shows upon its face evident dishonesty.

IN THE COURT OF CLAIMS.

RULIF VAN BRUNT *vs.* THE UNITED STATES.

Brief for claimant.

The facts in this case are few. On the 16th of February, 1814, the claimant leased of one John Jackson, for the term of one year, from the 1st of April, 1814, to April 1, 1815, at the yearly rent of \$325, a farm of land containing about thirty acres, whereon were a house and barn, and situated in Brooklyn, in county of Kings, in the State of New York. That he entered into the occupancy of said farm in pursuance of said lease, put in crops of oats and corn, and used and appropriated the same to the ordinary purposes of farm cultivation.

On the 2d of September of that year, (1814,) the twenty-second brigade of the New York militia, having been previously ordered into the service of the United States, took forcible possession of the whole of said demised premises by order of General Johnson, the commanding officer, appropriated the same to the use of the United States as camping ground and fort site. The farm was thus occupied until the month of December following.

The barn on the premises was, by order of the commanding officer, occupied as a guard-house. The fortification, called Fort Green, had been previously commenced, as would seem from the petition and the deposition of Doxey, by a military force raised under the charge of the committee called the committee of defence of the city of New York; but the United States troops entered into the occupancy and use of this fort, and the claimant insists that the United States, by directing its forces to occupy Fort Green, and encamp upon these premises, sanctioned, approved, and adopted what had been previously done by the local authorities, and took the responsibility and liability of said authorities off of their hands.

The local authorities had acted on an emergency in a case where the United States was bound to make good the defence, and by following up and completing what had been done for its benefit, the general government, the claimant submits, is liable to the same extent as if its troops had taken possession of the premises in the first instance.

Before the claimant had been at all disturbed, (p. 6, deposition of Doxey,) and prior to the 9th of August, when the first entry by military was made, he had harvested the grain and hay, and these were subsequently taken for the use of the army of the United States by order of General Johnson.

The claimant supposes the law of the case to be well settled. This case falls within the provisions of the act of 1816, and under the fifth section which is as follows:

"When any property has been impressed or taken by public authority, for the *use* or subsistence of the army during the late war, and the same shall have been destroyed, lost, or consumed, the *owner* of such property shall be paid," &c.

"This provision relates to *every species* of *property* taken or impressed for the *use* and subsistence of the army not comprehended in any of the preceding classes, and which shall have been in *any manner destroyed, lost, or consumed* by the army, including in its scope all kinds of provisions, *forage, fuel,*" &c.—(American State Papers, vol. 5, entitled "Claims.")

The claimant insists—

1st. That he is entitled to the whole amount of damages, as proved by the depositions of John Storm and Henry Reid; the use of the farm and the buildings thereon; the corn and oats, the pasturage and grass, the seed and labor, were the property of the *tenant*, and not of the landlord. Of all these, the claimant was "the owner" within the meaning of the act of 1815.

The fact that damages were appraised to Jackson, the landlord, in no respect makes against the claim of the undersigned.

The previous entry by the local military, which was only three weeks prior to the occupation by the United States troops, was merely in anticipation of such occupation by the latter, and the general government adopted the previous acts, and should be held as having ratified and appropriated the prior service as done for its benefit. In this view, it is wholly immaterial to inquire how much of said property was used or destroyed before, and how much after the 2d of September, 1814, when the premises passed into the exclusive occupancy of the United States.

2d. The claimant is at all events entitled to something. He should be paid for the use of the barn and premises from September 2, 1814, and for the "straw, hay, and grain that was in said barn," which were used, according to the evidence of Doxey, by the army of the *United States*.

The removal of the fences, the breaking of the soil, and the construction of Fort Green, were permanent injuries to the freehold, for which the landlord was entitled to compensation. He was "the owner" of the fee. But the property above enumerated, for which damages are now claimed, was the property of the tenant, and belonged to the undersigned, and for which he solemnly asserts he has in no manner been compensated.

The claimant respectfully submits that he should receive the amount of his claim, with interest thereon, and that this honorable court should recommend the same to the favorable consideration of Congress.

RULIF VAN BRUNT.

IN THE COURT OF CLAIMS.

RULIF VAN BRUNT *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for injury done to land and growing crops occupied by plaintiff, by the militia of New York in the service of the United States at Brooklyn, N. Y., in 1814.

FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. That in the year 1814, plaintiff was a tenant of John Jackson of a farm in or near the now city of Brooklyn, New York, at the rent of \$325; and for this sum he was to have the use of a house, barn, and farm, and was to render certain services.—(*Lease, Record, p. 8.*)

Second. That there is no evidence that the premises hired by plaintiff were interfered with by the militia prior to September 1814.

Third. There is no evidence that the plaintiff, in fact, paid rent for the premises mentioned for the year 1814.

Fourth. There is no proof of the amount of property belonging to plaintiff actually destroyed by the militia.

The estimates of John Storm and Henry Reid, found at page 7 of

the record, do not prove that the plaintiff lost what they there estimated. Neither of the witnesses testify that he knew what loss was actually sustained by him, but that they estimate the damage sustained by him at certain amounts. They estimate the rent at \$385 per annum, when the lease put in evidence by the plaintiff specifies the rent at only \$325. They do not appear to have taken into the account the fact that the plaintiff had the use of the farm, including the buildings, pasturage, and also the hay and all the early crops, from the 1st of April to 2d of September, 1814.

Fifth. There is no evidence that the damages were estimated at the time of the transaction, or earlier than the year 1844, a period of thirty years thereafter, when the appraisers were not likely to have remembered the quantity of things destroyed or their value.

Sixth. There is no evidence that the plaintiff could not now prove the loss sustained by living witnesses who could be cross-examined.

Seventh. That the damage which was sustained by the owner of the premises is shown to have been appraised at the time by Gen. Johnson and two others, and the presumption is, that said appraisal included the damages to the premises occupied by the plaintiff, and to the crops thereon.

Gen. Johnson certified that the 22d brigade of New York infantry were called into the service of the United States, and encamped at Fort Green "on the *second of September, 1814*, on land then owned by John Jackson, which, with a house and barn, he had rented to Rulif Van Brunt. About half of the land whereon the fort was built, and the land whereon the brigade encamped, is included in the loss of Mr. Van Brunt. *All the fence was removed from the land and the produce of his labors destroyed before the 2d of September.* The dwelling-house was in the possession of a man named Turney, and the barn was occupied as a guard-house by my order, on the *consent of John Jackson.*

"And I further certify that John B. Coles and John Morse, of the city of New York, and myself, appraised the damages sustained by John Jackson and several other persons, occasioned by the occupation of their land for the public service and defence, and that the damage sustained by Mr. Van Brunt was not appraised by us."—(Record, pp. 5, 6.)

Eighth. The property, or at least a portion of it, was out of the possession of the plaintiff at the time it was occupied by Gen. Johnson under and by the consent of Jackson, the owner, and his damage was appraised.

See quotation next above, where it appears that Turney occupied the house, and that the barn was occupied under Jackson; that the fence had been destroyed, and the damage sustained was appraised to Jackson by Gen. Johnson and others.

Ninth. When appraising the damages at the time sustained by different individuals, if the plaintiff had sustained damages, the same would have then most probably been appraised, and paid to him as well as to others.

Tenth. The damage which actually accrued, appears to have been occasioned by acts committed prior to the 2d of September, 1814, when Gen. Johnson, acting under the United States, took possession

of Fort Green. The proof does not show who committed these acts. They are in no way connected by proof with the United States. The petition shows by whom it was committed. It states: "That on the ninth day of August, 1814, *said premises were entered upon by the military authorities of the county, and, as he is informed, by the military raised under the charge of the committee called the 'Committee of Defence' of the city of New York;* and the said premises were occupied from and after the said 9th day of August, 1814, by the said military, until about the 3d day of December, 1814; and a fort called 'Fort Green,' was erected thereon, which was occupied by the military of the United States, and the whole premises and the crops grown and growing thereon were taken, appropriated, and destroyed by *said committee, or by the military, or by those acting under their authority.*"

From this statement it is certain that the injury committed was by the "Committee of Defence of the city of New York," for whose acts the United States were not responsible. Whether this committee was self-constituted or was organized under city or State authority, is not shown. But it is certain that neither the petition nor the evidence in the record shows that said committee was acting under the authority or by order of the United States, and without showing that it acted by such authority, the latter cannot be held responsible.

Eleventh. From these facts it is apparent that the damage was nearly all sustained prior to General Johnson going to the Fort, and that it was occasioned by the acts of persons for whose conduct the United States were in no respect responsible

LEGAL PROPOSITIONS.

FIRST. *The evidence offered on the part of the plaintiff is not such as is competent to prove the facts upon which his claim rests.*

None of the affidavits produced have been taken in this cause. They are *ex parte*, and clearly do not show the whole facts of the case.

It is not shown that there are not now living other persons who can prove all about this claim.

Jackson may be living and within reach, and he must be able to prove the whole facts.

SECOND. *Most of the damage claimed appears to have been sustained by Jackson, the owner, and not by plaintiff, and was appraised to him, and it is fair to presume was paid to him.*

There is no evidence that plaintiff paid rent for the time the troops were at Fort Green, or for any other time. And none that he was ousted either from the house or barn. From the statement of General Johnson, the inference is, that plaintiff was not in possession at the time, but that the whole fell upon Jackson, to whom the damages were appraised. The damages appraised to Jackson doubtless covered all that were sustained at the time of the transaction.

It is fairly inferable that the plaintiff had surrendered possession **at** or before the militia were stationed at Fort Green under General

Johnson, inasmuch as the occupancy or a portion of it was by Jackson's own permission.

THIRD. *There is no law under which the plaintiff can recover for these damages, if they were actually sustained by him.*

The act of 1816, (3 U. S. L., 291,) to which plaintiff refers in his brief to sustain his claim, is not now in force, and cannot, therefore, lay the foundation of judicial action, even if this case come within the principles of the 5th section of that act, as he supposes. If it applied to plaintiff's case, it would extend to only a portion of the items claimed. His lease was not taken from him, and he had had it for over five months before the militia under General Johnson were stationed there.

There is no evidence that his oats or corn were destroyed, and none that his pasture was injured, and there is no evidence that he had planted seed or lost labor. That act only applied to actual, and not constructive losses, and all damages payable under it were to be paid to the owner. Most of the losses claimed would not have come under this act. The injury was Jackson's and was appraised to him. But whether the law applied to the plaintiff or Jackson, it is not now in force, and this court cannot act under and apply it. Should Congress revive that law, then the plaintiff might be entitled to pay on presenting the proper evidence at the Third Auditor's office. Until Congress revives the law or passes another one to cover the case, the plaintiff cannot obtain compensation for the losses he claims to have sustained, even if he had conclusively proved the same by legal and competent evidence.

FOURTH. *The United States are in no respect responsible for the acts of the committee of defence, who, it seems, occasioned nearly the whole injury complained of.*

If we were to concede that the United States were responsible, under the act of 1816, while practically in force, for the injury occasioned by General Johnson, it is clear that they were not liable for the acts of the New York committee of defence, who were not called into existence by them, and who are not shown to have acted under the direction of the defendants. That committee, or their employers, were alone responsible for the acts complained of, committed by order of the committee.

R. H. GILLET, *Solicitor.*

MARCH 17, 1859.

IN THE COURT OF CLAIMS, JUNE 6, 1859.

RULIF VAN BRUNT *vs.* THE UNITED STATES.

SCARBURGH J., delivered the opinion of the court.

The petitioner states the following case :

He was the lessee from John Jackson of a lot of land in Brooklyn,

in the State of New York, for the term of one year from the 1st day of April, A. D. 1814, till the 1st day of April, A. D. 1815, at a rent of \$325 per annum, which was duly paid.

He entered upon the premises on the 1st day of April, A. D. 1814, and put in a crop of grain and vegetables.

On the 9th day of August, A. D. 1814, the military authorities of the county of Kings, and the military raised under the charge of the "Committee of Defence" of the city of New York, entered upon the demised premises. A fort, called "Fort Green," was erected thereon and occupied by the military of the United States. The whole premises and the crops grown and growing thereon were taken, appropriated, and destroyed by the committee, or by the military, or by those acting under their authority, and the petitioner thereby lost his entire crop, his labor, and the rent paid by him, of the value of \$1,050.

The petitioner in December, A. D. 1844, applied to Congress for relief.

Jeremiah Johnson testifies as follows:

He was the brigadier general of the 22d brigade of the New York State infantry; his brigade was ordered into the service of the United States, and on the 2d day of September, A. D. 1815, encamped at Fort Green. About half the land on which the fort was built, and the land whereon the brigade encamped, was included in the lease to the petitioner. Before the 2d day of September, A. D. 1815, the fence was removed from the land, and the produce of his labor destroyed. The dwelling-house was in the possession of a man named Turney, and by order of the witness, on the consent of John Jackson the barn was occupied as a guard-house.

The witness, with John B. Coles and John Moore, appraised the damages sustained by John Jackson and several other persons, by the occupation of their land for the public service and defence; but the damage sustained by the petitioner was not appraised by them.

Samuel Doxsey testifies as follows:

The petitioner in the year 1814 occupied a farm belonging to John Jackson. Sometime in that year the erection of Fort Green was commenced on the farm, by which the fence was thrown down and the farm turned into a common. In the first part of September in that year the brigade, under the command of Brigadier General Jeremiah Johnson, encamped on the farm and occupied the barn as a guard-house, and used the straw, hay, and grain, in the barn for the purpose of bedding, &c. The petitioner was compelled wholly to abandon the farm, and procure a house for his family and stabling for his stock elsewhere.

The witness is unable to make an estimate of the losses sustained by the petitioner, but feels confident that he suffered serious loss by reason of having to remove from the farm.

John Stone estimates that the petitioner's damages, by reason of the farm he occupied in 1814 being taken for military purposes, at \$960; Henry Reid estimates them at \$960; and Samuel Snyder estimates them at \$1,050, or thereabouts.

The petitioner has filed the deed of lease, and proved its execution by Jeremiah Johnson.

He has also filed two papers purporting to be two receipts from John Jackson to him, the one bearing date the 1st day of April, A. D. 1814, for eighty-one dollars and twenty-five cents, "for one quarter's rent of place he has hired of me, where Abraham lived," and the other bearing date July 30, A. D. 1814, for eighty-one dollars and twenty-five cents, "in full for half year's rent of place he lives on." But there is no proof of the genuineness of these papers, nor is there any proof of the payment of any portion of the rent, unless the petitioner's possession of the premises and the requirement in the deed of lease that \$81 25 should be paid on the 1st day of April, A. D. 1814, can be regarded as affording a presumption of the payment of the first quarter's rent. The residue of the rent was payable quarterly.

On the 2d day of September, A. D. 1814, when the troops in the service of the United States encamped upon the premises, the dwelling-house was in the possession, not of the petitioner, but of John Jackson; and the order to occupy the barn as a guard-house was given with the consent, not of the petitioner, but of John Jackson. Afterwards the damages sustained by John Jackson, by reason of the occupancy of *his* land, were appraised, but no notice was taken of any damages sustained by the petitioner. A period of thirty years elapsed before the petitioner presented his claim, and no explanation is offered to account for his delay. Moreover, the testimony, though now admissible, all the witnesses being either dead or out of the reach of the petitioner, was yet taken, *ex parte*, and is to be received with caution.

Upon these facts we cannot say that when the troops in the service of the United States entered upon the premises the petitioner had any interest in them. In truth they rather sanction a contrary presumption. Our opinion, therefore, is that the evidence does not sustain the petitioner's claim, and that he is not entitled to relief.

PETER N. PAILLET.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

THE COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

PETER N. PAILLET vs. THE UNITED STATES.

1. Resolution of the Senate referring the petition to the Court of Claims and original documentary evidence accompanying the same, relied upon by claimant and returned to the Senate.

2. Evidence presented in behalf of the government transmitted to the Senate.

3. Claimant's brief.

4. United States Solicitor's brief.

5. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this fifth day of December, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

PETER N. PAILLET vs. UNITED STATES.

Claimant's Brief.

The evidence shows that the petitioner was an American citizen, a native of Louisiana, residing in the city of Tabasco, and carrying on

the business of a merchant at the time of the capture of the city by the American troops, in June, 1847.

The petitioner states, that in consequence of his refusal to pay a forced contribution of \$300, to enable the Mexicans to carry on the war, he was imprisoned and maltreated, and threatened with execution, when he was fortunately released by the generous interposition of Mr. P. Sastre y Mazas, the Spanish consul, who paid for him the sum demanded. That a few days after the first attack by the American troops, he was ordered to leave the city, and a passport for this purpose furnished to him. (No. 2, p. 6.)

The letter of Lieut. Magruder, of 17th June, 1847, (p. 7,) written under the direction of Commodore Perry, expresses "much regret that some injury has been done to your property, now occupied by part of the forces of the United States." That the commodore had directed that the doors of the houses on the plaza should be forced. "After your door had been forced, it was discovered to be the property of an American." (It will be remembered that Paillet had left the key with the Spanish consul.) The lieutenant then adds: "You know the difficulty of restraining men after a town has been captured; we did all we could to prevent any injury to your property, but the store in the rear was forced and some wine and goods taken out."

In Lieut. Magruder's letter, 31 July, (p. 7,) he says: "Three of my men were detected, and were immediately placed in close confinement. Their persons were searched and stripped of the articles they had taken from your store, such as blue nankeen, fans, handkerchiefs, and other small articles. Nothing of value was found upon them except a gold watch, which, with every other article recovered, was delivered over to the Spanish consul." The men belonging to this vessel were, however, not the only ones engaged in it. The apartments occupied by the men from the United States sloop of war John Adams led to your back yard and store, and a portion of these men were also detected in the pillage of your effects."

In Paillet's letter to Commander Magruder, 16th August, 1847, (p. 10,) he writes: "I am sorry to say that I found my house in a most wretched state of destruction that would have inspired compassion in any human heart; even my own clothes and that of my family have been taken away, with all my silver plate, of considerable value, \$2,500 in silver, and 120 doubloons in gold," &c., &c.

In the deposition of Gutierrez, he says, that on the troops leaving the house he went there, "and found everything in a state of destruction; all his furniture, and the greatest part of the goods that were in the store torn to pieces, and the ground floor of his house digged in several places." He also says, "my firm opinion is, that his damage amounts from ten to twelve thousand dollars," (p. 13.)

Regil testifies, (p. 14,) that he resided "next door to the residence of Paillet; that immediately after the abandonment of the city by the American forces, I made a thorough examination of the house of said Paillet, and found it in a state of great confusion, and much injured by said occupation as quarters, &c., the furniture very much damaged, the wardrobes, of which there were several, bureaus, and trunks having been broken open and emptied of their contents, the

clothing, linen, &c., were scattered over the floors, together with large quantities of the goods of the store; all of which were ruined by their exposure on the floor, and also by there having been large numbers of demijohns of red wine and jugs of oil broken, and their contents spilt among the clothing, goods, &c., in such large quantities as to nearly float the articles lying scattered about on the floor." He further states that the damage done to Paillet's property was "from ten to twelve thousand dollars."

M. Capella testifies that he was duly commissioned by Commander Van Brunt, civil and military governor of Tabasco, as "alcalde and chief magistrate." He testifies, (p. 15,) that at the time of taking possession, the store was "filled with assorted merchandise, to the amount, as he believes, of \$15,000, and his private dwelling full of all the necessary furniture and wearing apparel of a large and wealthy family." He further says, after describing the condition of the house when he officially inspected it, "in my estimation, firm and conscientious conviction, the actual loss sustained by Mr. Paillet must be over \$12,000. Mr. Paillet's position in society, his proverbial good faith in all his dealings, and the dignified and honorable bearing he took as an American citizen, in refusing to pay over the contribution imposed on him by the Mexican authorities to carry on the war against his countrymen, preferring imprisonment and all the subsequent most arbitrary and harsh treatment, such as banishment from the city, and consequent but involuntary banishment of home and property, entitle Mr. Paillet at least to an indemnity of his losses actually suffered, if not an allowance of damages as equity demands."

The schedule of losses attached to the memorial verified by affidavit and presented to Congress, shows a loss in specie of.....	\$4,470
Less the amount returned by Van Brunt.....	2,444
	2,026
Deducting the whole amount of specie lost from the aggregate loss of.....	
	7,233
Say.....	4,470
Leaves for loss of goods.....	2,753
Add loss of specie.....	2,026
Aggregate of loss.....	4,779

In the deposition of Lieut. Murray, sailing master of the *Vesuvius*, Commander Magruder, who quartered in Paillet's house the evening he entered the city, he describes the arrest of three of his men found pillaging the store; he says, "other men had evidently been there before them, for articles of merchandise were strewn about the floor, and several cases and baskets containing wine and liquor had been broken open, though but a small portion of their contents appeared to have been consumed."

Lieutenant Murray and party left the next morning about 11 a. m. He says: "The detachment from the *John Adams*, under command

of Lieutenant, now Commander Gansevoort, about forty men, occupied the next building to us, which adjoined the main building of Mr. Paillet, and had a yard running back perhaps the same depth with ours. We left them there when we quitted Tabasco. It was understood that the house would be occupied by some other detachment as soon as we vacated it." Further, this witness testifies, "*the property, both in the store and the house, appeared to have been undisturbed until our detachment took possession.*"

Lieutenant Murray further testifies: "The articles charged in Mr. Paillet's statement would not be out of keeping with the character of the house. It appeared to be the residence of a wealthy man." Again: "The contents of the store appeared to be valuable."

Captain Van Brunt testifies, that "the articles charged for were such as were likely to have been contained in a house of the style which this bore." "I had reason to believe, from the appearance of things, as well as from reports, that the *premises had been plundered, and perhaps to a considerable extent.*"

These two last witnesses were examined on behalf of the government, and their depositions contain the only evidence which the government has offered to invalidate the claim.

This case was presented to Congress for relief at the 1st session of the 31st Congress, and has been twice reported favorably by the Committee on Claims of the Senate. At the last session, a special resolution passed that body referring the petition and accompanying papers to this court, with direction to report the evidence to Congress, "with the opinion of the court upon the legality or equity of said claim."

Two questions are therefore presented:

1st. Whether the claim gives either a legal or equitable claim on the government for damage sustained?

2d. What is the amount of the damage shown by the evidence?

As to the 1st question, it is admitted that the general rule of the law of nations is, that a citizen domiciled in an enemy's country for the purpose of commerce, is "deemed an enemy, with reference to the seizure of so much of his property, concerned in the enemy's trade, as is connected with his residence. It is found adhering to the enemy; he is himself adhering to the enemy." (Wheat. Law of Nations, 378.) But the rule is thus qualified, by the same author. (Idem.) "The national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by *turning his back on the country* in which he resided, on his way to *another.*"

The rule and the exception taken together is, that while the domicile raises the presumption that the party intends to maintain his allegiance to the country of his residence, and claim protection by virtue of that allegiance, yet if on the breaking out of the war the acts of the party show that he intends to abandon that allegiance, and look to the protection solely of his own country, his goods will not be deemed subject of seizure as enemy's goods.

The facts of this case, which show the cruel punishment and banishment inflicted by Mexican authority, because of Paillet's refusal

to furnish the means to carry on the war against his own country, fully bring him within the exception of the rule.

This view is sustained with great precision by the Senate committee.

“While it is a well established principle in the law of nations that the domicil of a citizen in a foreign country at war with his own, impresses with a hostile character his property connected with his residence in the enemy’s country, so as to render it lawful prize if liable to capture by the ordinary usages of war, the committee are of opinion that in regard to property under the peculiar circumstances of the memorialists, a different rule should prevail. If it had been in fact the property of an enemy, it would not, in accordance with the modern usages of war, have been subject to pillage after the capture of the city. An alien enemy, it is true, might not be able to obtain redress for such an injury by reason of his own hostile character, but that reason is inapplicable to the case of a countryman of the captors, who at the time of the capture is treated as an enemy by the government where he resides, and denied, on that account, the benefit of his domicil and the means or opportunity of protecting his property. From the moment of his banishment to the interior as an American citizen, claiming exemption as such from the contributions demanded of him for the war, it appears to the committee that the hostile character which might otherwise have attached to the memorialists as a voluntary resident at Tabasco ceased; and that while suffering in the enemy’s territory the disabilities of an American citizen, he had a right to expect for his property the protection of his countrymen. If under such circumstances his property, left under the charge of the representative of a neutral government, instead of being protected by the captors of the city, is appropriated by them to the public use, or injured while in their forcible occupation—especially when it has been continued, as in this case, after notice of the circumstances entitling it to protection—it is an injury for which the memorialist, in the opinion of the committee, has an equitable claim on the government for indemnity.”

But admitting this claim could not be urged on the ground of its *legality*, that it is such an one as could not be enforced in a court of law if the government were suable, I think there can be no doubt of the *equity* of the claim, and it is on the equity as well as the legality of the claim that the court is to give its opinion.

On the second question, as to damage, the evidence establishes positively—

1. That when Paillet was banished his house was locked up, and the key entrusted to the Spanish consul.

2. That on landing the officers of the United States took possession and broke open the doors.

3. That the occupation of the troops, and their pillage, produced great damage.

4. That in the opinion of witnesses who were on the spot, and examined the premises as soon as they were evacuated, those damages amounted to from ten to twelve thousand dollars.

5. That by the judgment of the officers examined by the government, the articles charged to have been lost were such as were likely

to have been found in such an establishment. These constitute the predicate for the admission of Paillet's sworn statement as to the itemized list of his losses, and bring him within the exception to the rule that a party cannot testify in his own cause.

The exception arises from the "necessity of the case, and the nature of the subject; no proof can otherwise be expected. For when the law can have no force but by the evidence of the person in interest, then the rules of the common law in respect to evidence in general are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good, than which the nature of the subject presumes none better to be attainable." (1 Greenleaf, Evid., p. 348.)

Again: "In trials of fact without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must of necessity be read or heard by the judge, in order to determine its character and value. In such cases the only question in effect is upon the sufficiency and weight of the evidence." (Idem., p. 49.)

If we deduct from the whole amount claimed the specie returned, as also that which it is alleged has never been recovered, it leaves the amount of \$2,753, and with the character for probity which the evidence shows the petitioner enjoyed, this would be the very least amount he should receive, and this is the amount which, under Senator Wade's bill, he would have been entitled to.

P. PHILLIPS,
Solicitor for petitioner.

WASHINGTON, November 23, 1858.

IN THE COURT OF CLAIMS.—No. —.

PETER N. PAILLET *vs.* THE UNITED STATES.

Deputy Solicitor's brief.

I.—FACTS AS UNDERSTOOD BY THE SOLICITOR.

The petitioner appears to be a citizen of the United States, and to have established himself in Mexico in the year 1827. (See passport, Record, p. 5.)

During the war between the United States and Mexico he was a resident of the city of Tabasco, where he had and occupied a dwelling house handsomely furnished, fronting on the plaza; and in rear of the dwelling and fronting on a back street was a store filled with merchandise, principally dry goods, with some wines and liquors.

On the 18th of December, 1846, he was required by a law that day published (see petition, p. 4, and passport, p. 6) to retire into the country 20 leagues from Tabasco; and did so, taking all his family with him, and leaving the keys of his house with the Spanish consul.

On the 16th day of June, 1847, about 4 o'clock p. m., Tabasco was captured by the American forces under Commodore Perry, (see his report, Ex. Doc., H. R., No. 1, 2d sess. 30th Cong., p. 1209;) it remained in their possession until the latter part of July following. (Id., p. 1227; deposition of Regil, Record, p. 14.)

When the troops entered the city they sought shelter in the houses around the plaza, all of which seem to have been alike closed, and had to be broken open (letter of Commander Magruder, Record, p. 7) before the Americans could obtain shelter from the weather.

Mr. Paillet's house was supposed to belong to a Mexican, yet strict orders were given that property found therein should be respected. (Murray's deposition, Record, p. 21.)

The condition of the house when entered showed that it had been vacated hastily.

The private property in the dwelling house was scrupulously cared for; none was taken during that night, or before Lieutenant Murray left the next day, June 17. (See his deposition, Record, p. 21.)

The store, however, was broken open by some of our men late on the evening of the occupation, and some property taken therefrom; but this pillaging was stopped almost immediately; all that could be recovered was restored; the store was secured and sentries placed to protect it. (Murray's deposition, page 21; Van Brunt's deposition, p. 23.)

Lieutenant Murray's detachment vacated the house and left the city at 11 o'clock on the 17th of June, leaving Commander Magruder in the house. Commander Magruder, the same day, June 17, wrote to Mr. Paillet, expressing the regret of Commodore Perry at the pillage of the store, and stating that everything had been done for the security of the goods and furniture. (Letters of June 17, Record, p. 7, and July 31, id., p. 8.)

On the 22d of June the house was then vacated entirely by the troops at the instance of the Spanish consul, Pablo Sastre y Mazas, who was charged by Mr. Paillet with the care of his property. (See his letters, Record, pp. 6 and 9, and Capella's deposition, p. 15.)

Commander Van Brunt assumed command of Tabasco, on the 22d of June, (see his report to Commodore Perry, Ex. Doc. No. 1, H. R., 2d sess. 30th Cong., p. 1222, and Mr. Sastre's letter, Record, p. 6.) Soon after, and probably on the night of June 28, (see letter of Mr. Sastre y Mazas, Record, p. 9,) the house was broken open and plundered, and great damage done to the property by "some desperadoes," (see Van Brunt's deposition, Record, p. 23, and Capella's p. 15,) who were most probably Mexicans. (Van Brunt's 2d answer.) They had dug over the floors in search of money. This occurrence being reported to Mr. Capella, acting alcalde and chief magistrate, he repaired to the house, and, in order to preserve what remained of the property for the owner, he suggested that search be made for concealed treasure. (See his deposition, Record, pp. 15 and 16.) This being done by United States officers and men, with the assent of Governor Van Brunt, a quantity of money was found which was taken charge of by the latter. The finding of this money was officially reported

by Commander Van Brunt to Commodore Perry, under date of July 1, 1847, in the following terms:

"I have on board \$2,442 75, said to belong to Peter N. Paillet, who calls himself an American citizen. This money was found buried back of the store which adjoins the 'government house;' and the information of its being there was communicated to Captain Bigelow by Captain Taylor, who was present with three of his men when it was found. It was taken up in the presence and under the direction of Lieutenant William S. Blanton, who delivered it to me by order of Captain Bigelow." (Ex. Doc. No. 1, Ho. Reps., 2d sess. 30th Con., p. 1231.)

This money was restored to Mr. Paillet on his demand. (See petition, Record, p. 4, and his letter to Commander Magruder, Record, p. 11.)

No further depredations appear to have been committed on the property; the condition of the property after this outrage, as described by Mr. Capella in his deposition, (Record, p. 15,) agreeing with the description of Mr. Regil in his deposition, (Record, p. 11,) and of Mr. Paillet in his letter to Commander Magruder, (Record, p. 11.)

II.—*Only a very small portion of the damages and losses complained of was sustained while the house was occupied by the American troops.*

The statement of losses at page 12 of the record comprises two classes of goods, 1st: furniture and clothing in the dwelling-house, and 2d: merchandise in the store. Of this last, the entire amount lost is set down at \$500, including 25 demijohns of Malaga wine valued at \$200, which were removed into the dwelling-house on the evening of the 16th, before any quantity had been abstracted, (Murray's deposition, Record, p. 21.) Certainly not more than \$300 worth of store goods were taken by marines and sailors on the occasion of the first plunder.

Lieutenant Murray's deposition, (Record, p. 21,) Magruder's letters to Paillet, (Record, p. 7,) Mr. Sastre's letter to the same, (Record, p. 6,) prove that nothing was lost from the dwelling-house up to the time when the house was vacated by Commander Magruder, when the house was securely fastened and restored to the charge of Mr. Sastre.

It was unquestionably in the subsequent plunder of the house, on the night of the 28th June, that nearly all the loss suffered during the American occupation occurred. The only evidence to impute this to the Americans is that of Mr. Sastre, (Record, p. 9,) who, in a letter to Mr. Paillet, says Commodore Van Brunt told him the house was broken open by his order to search for treasure; but this is an entire mistake, as shown by Capella's and Van Brunt's depositions, (Record, pp. 15, 22.) The despatches in the public document, above referred to, show that the American force was very small, and that military control of the town was maintained only by the guns of the war vessels. The plunderers of the house were as probably Mexicans as Americans, and Commander Van Brunt thought then and thinks now they were Mexicans, (2d answer, Record, p. 23.) Had the property been stolen by the Americans, the friendly disposition of the

officers and the impossibility of concealment would have caused their detection.

The particulars of the damage suffered are supported solely by Mr. Paillet's own evidence. Waiving the question of its admissibility, and referring to its sufficiency, it appears that the loss estimated by Mr. Paillet is the difference between the value of the property left by him in his house in December, 1846, and that found by him on his return to the house after the evacuation of the city by the American troops. Some things may have been stolen or removed before and after this period.

III.—*The occupation of Mr. Paillet's house by the American troops was justified by the laws of war.*

The ground that the character of Mr. Paillet as an American citizen should have exempted his house from occupation is untenable. The national character of the owner of the soil is not impressed upon the soil. "Personal property," said the Supreme Court, "may follow the person anywhere; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, *that land is hostile or friendly* according to the character of the country in which it is placed." (30 hogsheads of sugar *vs.* Boyle and others, 9 Cranch, 190, and cases there cited.) In that case the produce of hostile land, where land and produce both belonged to a friend, was condemned as enemy's property; *a fortiori*, the land itself in a hostile country, though belonging to a friend, where the laws of war justified and necessity required the occupation of enemy's land, is to be treated as enemy's land. (Wheaton's International law, part iv, chap. 1. sec. 21.)

IV.—*Neither the occupation of his property by the troops, nor any other act of the officers of the United States, was the cause of damage to the claimant.*

As shown above, the property actually occupied by the American officers, that is, the dwelling-house, was secured from damage during the occupation, and safely delivered into the custody of Mr. Paillet's agent. The store, which was not occupied, was the only place pillaged during that occupancy. There is no evidence to connect this pillage with the occupancy of the main building. Nor is there any evidence to show that the occupancy of the dwelling-house from June 16th to June 23d, had any part in causing the plunder on the night of June 28.

V.—*The United States are not liable for the damage done on this occasion by their soldiers, marines, or sailors.*

It is a settled principle of law that government is not liable for the errors and negligence of its officers and agents, even to the extent that an individual would be. (Decisions of this court in Thistle's and Clay's cases.) But the master, who is liable for damage caused by his

servant's negligence acting in his service, is not liable for his acts done with express malice, and still less for felonies committed not even under color of acting in his service. It would be carrying the liability of the government to a strange extreme to condemn it to pay for property stolen by soldiers or any other person in its hire.

VI.—*The claim is no more equitable than legal.*

The evidence shows that the officers of the United States evinced the most scrupulous regard for the property of Mr. Paillet, even when they believed it to belong to an enemy; and nothing could exceed their anxious care for his interests when they found him to be an American citizen. They entered his house only when the Mexicans declined to point out the public houses, and to obtain shelter after a day of great exposure. (Capella's deposition, Rec., p. 15; despatches Ho. Doc. 1, 2d session 30th Congress, p. 1214.) Even an officer of Commander Magruder's rank attended personally to the nailing up of his store-house, (see his letter, Rec. p. 8;) and when the dwelling-house was afterwards broken open, every exertion was used to secure and preserve the treasure supposed to be concealed there.

On the other hand, Paillet had no special claims upon the consideration of this government. He had, it seems, been domiciled in Mexico for twenty years, and, after the outbreak of the war between the United States and Mexico, chose to remain in and adhere to Mexico, although the right of withdrawal with all his property was secured to him by treaty. (See treaty of April 5, 1831, art. xxvi, 8 Stat. 422.)

That he acted as consular agent for the United States is no more than Mexicans or other foreigners willingly did at other ports; and that he refused to pay a contribution is what most men would have done if they had so good a pretext for holding on to their money; it argued no remarkable degree of patriotism.

J. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

PETER N. PAILLET *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner makes in his petition the following averments:

1. That he is a citizen of the United States, and has a commercial house in the city of San Juan Bautista, the capital of the State of Tabasco, in Mexico.

2. That General Traconis imposed upon him a contribution of *three hundred dollars* for expenses of the war against the United States; that, having refused to pay the contribution, he was imprisoned and his life was threatened, but that the Spanish consul offered the money to Traconis, and the petitioner was then discharged from imprisonment.

3. That afterwards the city was menaced by the forces of the United States, and he sent away his family; that the next day the Americans attacked the city, and some cannon balls entered his house, breaking through his wardrobe, furniture, and beds of his family

4. That a few days afterwards General Traconis, by a passport, ordered him to retire twenty leagues from the city; that he did so retire, "with all his family, giving the keys of his house to the Spanish consul, with a general state of his interests and of the merchandise of his stores."

5. That some time afterwards the city was taken by the United States; that their troops forced his doors and entered his house to lodge therein; that his furniture was reduced to a miserable state, his warderobes were broken open, and most of his clothes, and that of his family, were lost.

6. That his house was opened a second time by the troops of the United States; and that, by digging in many places, they found \$2,200 in silver and 20 in doubloons in gold; that instead of those two sums of money they ought to have found in the same place \$2,500 in silver and 120 doubloons in gold, making in all the sum of \$4,400.

7. That he was injured to the amount of *four thousand seven hundred and seventy-nine dollars*.

1. As to the first averment.

This averment is sustained by the evidence.

2. As to the second averment.

There is no evidence in relation to this averment.

3. As to the third averment.

There is no evidence as to the material part of this averment.

4. As to the fourth averment.

There is on file in this case a paper purporting to be a passport from Juan Bautista Traconis, governor and commandant general of the State of Tabasco, in the following words:

"I grant a passport to Don Pedro Nuel Paillet, a native of the United States of the north, that, in compliance with a law this day published, he may pass into the country as far as the town of Teapa without molestation." But this paper is not duly authenticated.

5. As to the fifth averment.

Captain G. A. Magruder, in a letter addressed to ——— dated, Tabasco, June 17, A. D. 1847, said:

"I am directed by Commodore Perry to say that he regrets very much that some injury has been done to your property now occupied by part of the forces of the United States. When we reached the plaza it was raining very hard, and it was necessary that our men should be placed under cover, and the commodore directed the doors of the houses on the plaza to be forced. After your door had been forced, it was discovered to be the property of an American. * * We did all we could to prevent any injury to your property; but the store in the rear was forced, and some wine and goods taken out. Many things were recovered and delivered to your friend, the Spanish consul. * * * Rest assured that all has been done by the officers to prevent injury to your goods and furniture."

In a letter from Captain G. A. Magruder to the petitioner, dated United States brig Vesuvius, Laguna, July 31, A. D. 1847, he said :

“ I * * * regret to perceive that you do not appear fully to appreciate the earnest desire and the actual personal efforts of myself, as well as the officers under my immediate command, to preserve from injury and depredation the property which circumstances obliged us to occupy during the three days we were stationed at Tabasco. We did not know it was the property of an American citizen until after we had taken possession, and the commodore would doubtless have ordered us to remove had there been other shelter for our men around the square on which our forces were concentrated. The strictest orders were given to the men not to injure or molest the property in any way. It was explained to them that it belonged to our countryman, whose interests it was our duty to protect; and the severest punishment was threatened in case they were detected in committing any outrage. Three of my men were detected, and were immediately placed in close confinement and sent on board at the earliest moment. Their persons were searched and stript of the articles they had taken from your store—such as blue nankeen, fans, handkerchiefs, and other small articles. Nothing of value was found upon them except a gold watch, which, with every other article recovered, was delivered over to the Spanish consul, Mr. Sastre. Having a carpenter with me, I attended personally to the fastenings of the doors of the store, which had been forced open, and placed a sentinel to avoid further depredation. It was a source of deep mortification to myself, as well as to the commander-in-chief, that, notwithstanding all our efforts, these irregularities should have been committed; but we have the gratification of knowing that no efforts were spared on our part to prevent it.

The men belonging to this vessel, however, were not the only ones engaged in it. The apartments occupied by the men from the United States sloop-of-war John Adams led to your back yard and store, and a portion of these men were also detected in the pillage of your effects. Had I *have* known that you had a store adjoining your house, much, if not all, the mischief might have been prevented; but the injury had been done before I was aware of it. You cannot be ignorant of the difficulty of restraining men who have succeeded in carrying the defences of an enemy and capturing a town; plunder is considered by them as lawful and proper, and all the vigilance of the officers in any service has heretofore been insufficient wholly to prevent it.”

Ysidoro Gutierrez testifies that when the city of Tabasco was taken by the American troops in June, A. D. 1847, the petitioner's house was forced and occupied as quarters by them; and on their leaving the city he went to the house and found everything in a state of destruction; all the petitioner's furniture and the greatest part of the goods that were in his store torn to pieces, and the ground floors of his house digged in several places; that he saw a considerable quantity of money taken away and carried on board one of the American armed vessels; and that his firm opinion is that his damage amounts to *twelve thousand dollars*.

Manuel DeRegil testifies that during the time the city of Tabasco was in the possession of the armed forces of the United States, from

about the 16th day of June, A. D. 1847, to the 23d day of July, A. D. 1849, the house and store of the petitioner in that city were broken open by those forces and occupied by them as quarters; that the residence of the witness, at and during that time, was the next door to the petitioner's residence; that he made a thorough examination of the petitioner's house immediately after the abandonment of the city by the American forces; that he found it in a state of great confusion and much injured by its occupation as quarters, &c.; the furniture very much damaged, the wardrobes, (of which there were several,) bureaus, and trunks, having been broken open and emptied of their contents, and the clothing, linen, &c., together with large quantities of the goods of the store, scattered over the floors; all of which were ruined by their exposure on the floors; large numbers of demijohns of red wine and jugs of oil having been broken and their contents spilt among the clothing, goods, &c., in such large quantities as to nearly float the articles lying scattered about on the floors; that there was a rumor that there was a large amount of specie (one hundred and fifty thousand dollars) concealed in the house, the property of the petitioner, and, in consequence of the rumor, several excavations were made under the ground floor of the house for the purpose of finding the money; that a quantity of specie was actually found and sent on board one of the armed vessels belonging to the occupying forces; that the excavations very much injured the house, so much so that it was in a perfect state of ruin at the time the forces abandoned the city; that the petitioner, in the opinion of the witness, suffered damage in his property to the amount of from *ten to twelve thousand dollars*; the latter sum he considers to be a moderate estimate of the damages, during the time of the military occupation of the city by the forces of the United States, and that all he stated with reference to the destruction and injury of the property of the petitioner are facts notoriously known to nearly every one who was in the city during the time of the same being occupied as already mentioned.

M. Capella testifies that in June, A. D. 1847, Commodore Perry took possession of the city of Tabasco, and named Commander G. F. Van Brunt civil and military governor of the same; that the witness was duly commissioned by Governor Van Brunt to act as alcalde and chief magistrate; that when the American forces took possession of the city Commodore Perry, the commander-in-chief, desired that the public buildings should be designated, and the keys of the same delivered to him; that, there being no one to satisfy him, possession was taken of such buildings as he thought most conducive to the comfort and safety of his forces, among others of the house of the petitioner, and adjoining store, filled with assorted merchandise to the amount, as the witness believes, of at least \$15,000, and his private dwelling full of all the necessary furniture and wearing apparel of a large and wealthy family; that, a few days having elapsed, Commodore Perry, learning that the house belonged to an American, Mr. Paillet, who had been ordered out of the city on account of having refused to pay a contribution of \$300, levied on him by the Mexican authorities to raise funds to carry on the war with the United States, ordered the house to be evacuated and the doors closed; that about this time the

witness entered upon his official duties, he being empowered not only to act as judge in litigated cases, but also to preserve order, and to protect the property of unoffending residents ; that, in the prosecution of such duties, his attention was called by Captain W. B. Slack, commander of the land forces, to the property of the petitioner, which had been broken open by some desperadoes, it having been rumored that there was about \$150,000 in specie buried in the house ; that he entered the house then for the first time, accompanied by Captain Slack and several men, for the purpose of securing the doors and preventing further depredations ; that he was struck with astonishment at the disorder and complete desolation of everything in it—the wardrobe and trunks broken open, cases of merchandise in the same condition, and what left of them disseminated about the floor, and here and there lying, void of their contents ; watch, ring, breast-pin, and ear-ring cases, and all the plate and valuables of the house missing, the floors of almost all the chambers of the house having been dug in search of the rumored treasure ; that the witness, to preserve what remained of the property, consulted with Governor Van Brunt on the propriety of searching the building to discover, if possible, any specie, and take charge of the same for the petitioner ; that Governor Van Brunt, assenting, named Lieutenant William L. Blanton, of the navy, Captain Taylor, owner of the merchant schooner Spitfire, and four men, to accompany the witness, who proceeded to the house, and the first place likely for a deposit being singled out to the men, they began the diggings. * * * That, on entering the chamber where the work was carried on, a case had been [was] taken out, which contained a considerable amount of specie, together with gold doubloons ; that the box was deposited by Governor Van Brunt, and the sum used by his order, and applied to the payment of the troops, but afterwards, the witness believes, paid over to the petitioner, but not to the full amount claimed by him ; that, in the estimation, firm and conscientious conviction of the witness, the actual loss sustained by the petitioner must be over *twelve thousand dollars* ; that the petitioner's position in society, his proverbial good faith in all his dealings, and the dignified and honorable bearing he took as an American, in refusing to pay over the contribution imposed on him by the Mexican authorities to carry on the war against his countrymen, preferring imprisonment and all the subsequent most arbitrary and harsh treatment, such as banishment from the city, and consequent, but involuntary, abandonment of house and property, entitle the petitioner at least to an indemnity for his losses actually suffered, if not to an allowance for damages, as equity demands.

Lieutenant F. K. Murray, a witness on the part of the United States, testifies, that he was sailingmaster on board of the bomb vessel Vesuvius, Com. Magruder, and accompanied a detachment from that vessel which entered Tabasco in June, A. D 1847 ; that, on the evening of their entry into the city, quarters were assigned them in the house of the petitioner ; that the house appeared to have been vacated hastily, and they presumed it had been occupied by a Mexican ; that strict orders were given that the property found there was to be respected ; that there was no instance of a violation of these

orders until after dark, when it was reported to him by a petty officer (he being the executive officer of the detachment) that some of the men had broken into the store, situated within the same enclosure, and supposed to belong to the house; that on proceeding to the store he found three men pillaging, and placed them in charge of a guard that accompanied him; that this was about 9 o'clock p. m. Other men had evidently been there before them, for articles of merchandise were strewn about the floor, and several cases and baskets containing wines and liquors had been broken open, though but a small portion of their contents appeared to have been consumed; that the three men who had been captured in the act of pillaging were searched, and several articles of small value, together with a gold watch, were taken from them; that they were then placed in the guard-house; that the liquors and wines found in the store, of which there was not a great quantity, were removed to the rooms of the officers, where they were left undisturbed while they (the witness and his detachment) occupied those quarters; that the object of their removal was not only to preserve them for their owner, but to preserve the men from intoxication; that on mustering the detachment immediately on discovering this affair, many of them were found under the influence of liquor; that the whole detachment then, with the exception of five or six sober and trusty men, were locked up in one of the rooms of the house, to guard effectually against any further depredation; that the store was nailed, and a sentry stationed at the door; that he is certain that there was no further pillaging by his detachment up to the moment of their leaving the town next day; that they left about 11 o'clock a. m.; that the furniture and private property which were in the main building, occupied by the officers, were scrupulously cared for, and were untouched; that every article of value found in it was handed to the commanding officer, to be returned to the owner; that he knows nothing of what occurred subsequent to their departure, except from hearsay; that the detachment from the John Adams, under the command of Lieutenant, now Commander Guert Gansevoort, about sixty men, occupied the next building to them, which adjoined the main building of the petitioner, and had a yard running back, perhaps the same depth with theirs; that they left them there when they quitted Tabasco; that he left the house of the petitioner before the other officers of the detachment, to march the men to the boats which were to convey them to the steamer; that it was understood that the house would be occupied by some other detachment so soon as they vacated it; that Captain Magruder was among the officers who were there when he left; that the store-house fronted upon a back street, and contained articles of merchandise; that the property, both in the store and the house, appeared to have been undisturbed until his detachment took possession; that after they had nailed up the store, one of the crew of the John Adams was arrested for entering or attempting to enter it; that there was a sentry both on the inside of the yard and at the door of the street; that it was a very fine house, with a good many rooms; the furniture was very good; that the articles charged in the petitioner's statement would not be out of keeping with the character of the house; it ap-

peared to be the residence of a wealthy man ; he should think there were as many as twenty-five demijohns of wine taken into the house, and the contents of the store appeared to be valuable.

Gershom G. Van Brunt, a captain in the navy of the United States, and a witness on the part of the United States, testifies that he was on duty at Tabasco, Mexico, after its capture by the United States forces, in June, A. D. 1847 ; that he never occupied a house belonging to the petitioner ; he never saw him ; he and his family left Tabasco before it was taken possession of by the United States forces, and did not return whilst they held possession ; that a house, which he was told belonged to the petitioner, was occupied by some of their officers and men the night they took possession of the city, but he does not recollect who they were ; it is probable that Lieut. Murray may have been of the party ; that it was found unoccupied, and they sought shelter in it from the violence of the rain ; that as soon as possible after the capture of the city, measures were taken by Commodore Perry to secure the property found in this house from destruction by having the doors and windows secured ; that soon after he assumed the command of the city, a report was made to him that the petitioner's house had been broken open ; he then visited it with some of his officers, and found the wardrobes open, many valuable articles scattered around, consisting of demijohns, articles of clothing, &c. ; but what articles had been taken, or by whom, it was impossible for him to ascertain, although every effort was made to do so ; that it was then, and it is now his belief, from the reports made to him from the officers under his command, that the house and store had been pillaged by Mexicans ; and he took such measures as seemed necessary to prevent further depredations by placing sentries, &c. ; that it is his belief that if the petitioner had remained or left any person in charge of the property he would have lost nothing, certainly not at the hands of the United States officers and men ; that he never occupied the house or visited it on any other occasion than the one already mentioned ; that he saw some wardrobes, but did not observe what they contained ; he did not see the spoons, forks, plates, or pots of silver described in the petitioner's statement ; that he has no personal knowledge of any case of pillage either from the house or the store ; that nothing was taken by authorized officers from the house or store for the use of the troops, to his knowledge ; that he was told at the time that the petitioner was an American citizen, and remembers to have expressed astonishment that he had not remained and taken care of his property ; that he does not recollect the number of demijohns of wine he saw upon the occasion of his visit before referred to ; nothing was then removed from the house, or subsequently, to his knowledge ; that he does not recollect who was left in charge of the petitioner's property when the city was evacuated ; that he took possession of *two thousand four hundred and forty-four dollars* in silver, found upon the premises by some of his officers ; he has no personal knowledge of the circumstances under which it was found ; he had it counted and sealed, and as soon as he was convinced that the petitioner was its owner it was delivered to his order ; he has no knowledge of doubloons or any other money being found or carried from

the petitioner's premises; that he has no reason to believe that the petitioner lost any property by the acts or defaults of any of the officers or men of the United States forces after he assumed the command; that the character of the house and furniture was very respectable; he should say that the articles charged for were such as were likely to have been contained in a house of the style which this bore; he formed no estimate of the value of the contents of the store at the time of his visit; he had reason to believe, from the general appearance of things, as well as from reports, that the premises had been plundered, and perhaps to a considerable extent.

Commander Guert Gansevoort, a witness on the part of the United States, testifies that he was in command of a detachment from the United States sloop-of-war John Adams, in June, A. D. 1847, at the taking and occupation of the town of Tabasco, Mexico; he was quartered in the public square; does not recollect the names of any of the citizens, nor any one by the name of Paillet; does not know of any property taken by men of his detachment from the store in the rear of Mr. Paillet's residence, or any other store, or from the dwelling-house of Mr. Paillet; has no recollection of Mr. Paillet or his premises; that he saw ribbons, cloths, and other articles of merchandise scattered about in the square at the time specified, but in regard to the owner is entirely ignorant; that precautions were taken by Commander Perry, on entering the place, to prevent pillage, and he does not know any loss was occasioned by the acts or defaults of the officers of the United States forces.

This case was referred to this court by the following resolution of the Senate:

"*Resolved*, That the petition and accompanying papers in the case of Peter N. Paillet, praying indemnity for losses sustained during the war with Mexico, be, and the same are hereby, referred to the Court of Claims for examination of the character and amount of losses sustained by said petitioner, whether of goods, wares, merchandise, and money, as alleged in said petition, and to report to Congress the evidence in the case, with the opinion of the Court upon the legality or equity of said claim."

The first point for consideration is, whether this is a case of which this Court has jurisdiction. It was referred by the Senate. The reference itself, independently of the character of the case, gives this Court jurisdiction to *hear* and *determine* it, and it is the duty of this Court, after having finally acted upon it, to report it to Congress, stating "the material facts, which they find established by the evidence, with their opinion in the case, and the reasons upon which said opinion is founded." (10 Statutes at Large, p. 612, ch. 122, §§1-7.)

What, then, is this case? The petitioner was a citizen of the United States, domiciled in the city of Tabasco, Mexico, where he was engaged in trade as a merchant. His dwelling-house fronted on the plaza, and in the rear of it, fronting on a back street, was his storehouse. When the war broke out between Mexico and the United States, instead of repairing to his own country, he remained at Tabasco, in the regular prosecution of his business. In June, A. D. 1847, the city of Tabasco was captured by the forces of the United States

under Commodore Perry. The petitioner was not then in Tabasco. He had previously gone, with his family, into the interior of the country, leaving his property and the keys of his house and store in the care of the Spanish consul.

When the forces of the United States reached the plaza, it being necessary, in consequence of a heavy rain, to place the men under cover, Commodore Perry ordered the doors of the houses on the plaza to be forced. Under this order the doors of the petitioner's house were forced, and the officers and men belonging to a detachment from the bomb-vessel *Vesuvius*, under Commander Magruder, took possession of the house and occupied it as quarters. About 11 o'clock the next day the men, with Lieutenant Murray, returned to the ship, but Commander Magruder and the other officers remained at the house two days longer. When they took possession of it, it had the appearance of having been hastily vacated, but the property in it, as well as in the store, had not previously been disturbed.

Strict orders were given that the property found in the house was to be respected. But after dark, about 9 o'clock p. m., it was discovered that some of the men had broken into the store. Three of them were found pillaging, and placed in the guard-house. A gold watch, with several articles of small value, was taken from them, and subsequently delivered to the Spanish consul as the petitioner's agent. Other men had preceded them. Articles of merchandise were found strewn about the floor, and several cases and baskets containing wines and liquors had been broken open and a small portion of their contents consumed. The liquors and wines were removed to the rooms of the officers. Many of the men being found under the influence of liquor, the whole detachment, with the exception of five or six men, were locked up in one of the rooms. The store was nailed up, and a sentry placed at the door; there was a sentry on the inside of the yard and at the door on the street. The furniture and other property in the main building, occupied by the officers, was scrupulously cared for and untouched.

It does not appear that after the detachment from the *Vesuvius* and the officers, with Commander Magruder, left the house it was again occupied by any of the forces of the United States. It had in the mean time been discovered that the house and store belonged to a citizen of the United States. M. Capella states that a few days after the capture of the city, orders were given to evacuate the house and close the doors. But the men from the *Vesuvius* certainly left it early the next day, and the officers a few days afterwards; and Captain Van Brunt says that the house was occupied by "some of our officers and men *the night* we took the city." Captain Van Brunt also states that, "as soon as possible after the capture of the city, measures were taken by Commodore Perry to secure the property found in this house from destruction by having the doors and windows secured." Our conclusion from the whole evidence is, that it was not occupied by any of the forces of the United States after the detachment from the *Vesuvius* left it.

After Commander Van Brunt assumed the command of the city a report was made to him that the petitioner's house had been broken open. He then visited it and found the wardrobes open and many

valuable articles scattered around, consisting of demijohns of wine, articles of clothing, &c., and thereupon took such measures as seemed necessary to prevent further depredations, by placing sentries, &c. But all this occurred after Commander Magruder's detachment had left Tabasco. M. Capella says that the house had been broken open by some deperadoes, it having been rumored that there was about the sum of \$150,000 in specie buried in some part of the house; and that his attention being called to it, he entered the house and found the wardrobes and trunks broken open, and cases of merchandise lying scattered about the floor void of their contents, "the floors of all the chambers of the house having been dug in search of the rumored treasure." Search was then made in the presence and under the direction of Lieutenant William S. Blanton for the money supposed to be concealed there, and the sum of \$2,444 was found, and delivered by him to Captain Van Brunt, who had it counted and sealed, and subsequently caused it to be delivered to the petitioner.

The damage which was done to the petitioner's property, whilst his house was occupied by the forces of the United States, must have been small. The breaking open of the wardrobes and trunks and cases of merchandise, and the digging of the floors of the chambers, took place afterwards. The only acts which were done by the authority of the officers in command were the breaking open of the doors of the dwelling house, and the occupancy of it for a single night by the men, and two or three days by the officers of Commander Magruder's detachment. Whatever else occurred was done not only without the authority, but against the express orders of the officers, and notwithstanding their utmost efforts to prevent it. The precise "character and amount of losses sustained by" the petitioner, either whilst his house was occupied by the forces of the United States or afterwards, the evidence does not enable us to determine.

Under such circumstances it does not seem to us that the petitioner can, upon any principle, have any just claim against the United States. Though he was a citizen of the United States, yet he was domiciled in Mexico; and notwithstanding war had been raging for many months between his own country and Mexico he still remained in Mexico, and continued the prosecution of his trade and business there. He had been domiciled in that country for nearly twenty years. He had settled there, and engaged in the trade of the country, and given such evidence *animi manendi*, of an intention to remain as stamped him with the national character of the State in which he resided. He was not, strickly speaking, an enemy of the United States, yet he was such in reference to the property connected with his trade and his residence. It was found adhering to the enemy; and he himself was adhering to the enemy, though not criminally so. He had taken no steps to throw off the national character which he had acquired by his residence in Mexico, and was, therefore, bound by all the consequences of it. He not only had not returned to his native country, or turned his back on Mexico on his way to another country, or commened his removal, *bona fide*, without an intention of returning, but he had not even contemplated such a removal in any event. On the contrary, he continued to retain his domicil, and his property

there belonged to him in his character of subject or citizen of Mexico, and consequently was subject to the laws of war and of reprisals as if he had been actually an enemy. (Wheaton's Inter. Law, Book IV, ch. I, § 16, p. 394, § 17, p. 401—405, § 18, p. 407.) But the United States did not wilfully inflict any serious injury upon him. His house was occupied by their men from the Vesuvius a single night, and afterwards by their officers two or three days. Their conduct towards his property was characterized by all the moderation and all the scrupulous regard for his private rights and interests that the most liberal and most humane rules of modern warfare require. The damage which he sustained was but the result of the chances and dangers of war, and the disturbed state of the place of his residence. It was his choice to encounter the hazard of such contingencies, and he alone must bear their bitter fruits as regards his own property. He probably found, or thought he would find, his interest in remaining in Mexico; and, in common with hundreds of others, he became a sufferer from the consequences of the war and its attendant evils. But he has no just claim for relief against the United States. It is impossible that any country, however humane and however anxious to mitigate the evils of war, could have a treasury large enough to furnish indemnity in all cases like the present. The only ground on which the petitioner himself seems to suppose that he is entitled to consideration is, that notwithstanding his long residence in Mexico he still retains his love for his native country; that he was unwilling to pay a contribution, which was levied upon him to aid in defraying the expenses of the war against the United States; and he was required to retire into the interior of Mexico; and that in times past his house had been a friendly shelter to every countryman who had fallen into distress. But whilst all this, if it be true, may command for him as a man and as a citizen of the United States our respect and good will, and, if he were in circumstances to need charitable relief, would present a strong claim upon our benevolence, still it is wholly insufficient to sustain a claim upon the justice of the United States for indemnity.

Our opinion "upon the legality" and "equity of said claim" is, that the petitioner is not entitled to relief.

WILLIAM H. CHASE.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

THE COURT OF CLAIMS submitted the following
REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of

WILLIAM H. CHASE vs. THE UNITED STATES.

1. The petition of the claimant.
2. Documentary evidence filed in the case by claimant and transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse to the claim

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 5th day of December,
[L. s.] A. D. 1859.

SAMUEL H. HUNTINGTON,
Chief Clerk Court Claims.

UNITED STATES COURT OF CLAIMS.

WILLIAM H. CHASE vs. THE UNITED STATES.

To the honorable the judges of the Court of Claims :

The petition of William H. Chase, of the State of Florida, respectfully represents, that on the 7th day of July, 1838, he was commissioned as major in the corps of engineers in the army of the United States, and so continued until the 31st day of October, A. D. 1856, when he resigned his position in the army.

That from the date of his said commission, and prior to the same, to the 16th day of February, 1856, at about which time he was appointed the military superintendent of West Point, he was in command of a separate, fixed, and permanent post in the army, and had the charge of the superintendency of the construction of the fort at Pensacola, and other forts on the Gulf of Mexico; and in pursuance of the provisions of the sixth section of the act of Congress approved August 23, 1842, (5 Stat. at Large, 573,) he was entitled, from the date of the passage of said act to the said 16th day of February, A. D. 1856, to double rations. That he has never received the benefit of the said allowance provided by said act, except for one year, which was allowed him under the construction of an act of Congress approved September 28, 1850, (9 Stat. at Large, 504.)

Your petitioner therefore claims, that in pursuance of said statutes, and other statutes of the United States, and in accordance with the decisions of the courts of the United States and the practice of the department in analogous cases, he is entitled to the allowance of double rations from the said 23d day of August, 1842, to the 16th day of February, A. D. 1856, deducting therefrom the allowance for one year during said period, and asks of your honors to inquire into said matters, and to grant him adequate relief in the premises.

He has made application to the accounting officers of the treasury and to the Secretary of War, for the allowance of his claim, but the same has been denied. He has made no application to Congress and is the sole owner of the claim.

Dated Washington, November, 1856.

WM. H. CHASE.

Report of Chief Engineer.

ENGINEER DEPARTMENT,
Washington, February 21, 1857.

SIR: In answer to the request from the Court of Claims, dated the 5th instant, and referred by you to this office, I have the honor to enclose "a statement showing the duties upon which Major William H. Chase, of the corps of engineers of the United States army, was engaged, and his respective stations from 1842 to the date of his resignation," to which is added a statement showing the periods between the times referred to for which he had leave of absence.

This department, not understanding the nature of this case of "William H. Chase vs. The United States," is at a loss to know what further information is desired.

I have the honor to be, very respectfully, your obedient servant,
JOSEPH G. TOTTEN,
Bt. Brig. Gen. Top. Eng.

Hon. JEFFERSON DAVIS,
Secretary of War.

Statement showing the duties upon which Major Wm. H. Chase, of the corps of engineers of the United States army, was engaged, and his respective stations from 1842 to the date of his resignation.

DUTIES AND STATIONS CONNECTED WITH MILITARY CONSTRUCTIONS.

From January 1, 1842, till October 31, 1848, stationed at Pensacola, Fla., charged with the construction and repairs of the forts in Pensacola harbor and the general supervision of all works of fortification on the Gulf of Mexico.

October 31, 1848, was relieved of his duties in Pensacola harbor by Brevet Major Beauregard, of the corps of engineers.

(From October 31, 1848, till November 27, 1848, under orders for special duty. See items marked (A) on third page.)

December 13, 1848, relieved Major Beauregard, and resumed his former station and duties, as above, at Pensacola.

From December 13, 1848, till November 1, 1854, continued to be stationed at Pensacola, engaged upon the duties above stated.

November 1, 1854, turned over the public property at Fort McRee, in Pensacola harbor, to Ordnance Sergeant Armstrong (temporarily), and leaving Pensacola about November 6, arrived at Key West on November 16.

November 18, 1854, assumed charge of the construction of Fort Taylor, Key West, Florida.

From November 18, 1854, till February 16, 1856, stationed at Key West and charged with the construction of Fort Taylor and general supervision of fortifications on the Gulf of Mexico.

February 16, 1856, relieved by Brevet Major Fraser, of the corps of engineers, of the charge of Fort Taylor.

From February 16 till April 18, 1856, under orders to proceed to Washington, D. C., preparatory to assuming command of the military academy and post of West Point.

April 18, 1856, under orders to proceed to West Point and relieve Brevet Major Barnard, corps of engineers, of the superintendence of the military academy and command of the post of West Point.

May 3, 1856, relieved from said assignment to duty at West Point.

From May 3 till October 1, 1856, on leave of absence.

October 25, 1856, date of order accepting his resignation, to take effect October 31, 1856.

Additional duties on which Major Chase was engaged at intervals between 1842 and the date of his resignation, without having his stations changed.

From January 7 till March 6, 1845, on duty as a member of the board of engineers in preliminary examinations of Florida reef.

From about December 23, 1845, till April 26, 1846, on duty with special board of engineers for examining gulf coast of Texas and Mississippi, with reference to defence.

In August and September, 1847, member of a special board to examine the site of Fort McRee.

From March 13 till September 13, 1848, member of the board of engineers.

A

September 13, 1848, assigned to duty as member of a commission of naval and engineer officers, to examine the coast of California, &c.

November 27, 1848, released from said assignment without having performed any duties as a member of said commission.

From April 30 till about June 15, 1851, member of a special board to examine Memphis navy yard.

From September 18, 1852, till February 15, 1853, member of board to examine passes into the Mississippi river, with a view to their improvement.

From October 6, 1852, till April 1, 1854, in charge of works for the improvement of Dog river bar and Choctaw pass, harbor of Mobile.

From May 23, 1853, till March 7, 1855, in charge of surveys of Chattahoochee and Flint rivers.

From November 18, 1854, till about February 16, 1856, charged with construction of coal depot, under Navy Department, at Key West.

The periods between the 1st of January, 1842, and the date of his resignation in 1856, for which Major Chase had leave of absence from his stations at Pensacola, &c., and times of absence.

Twenty days by authority dated October 11, 1844, (left his post October 20, returned November 23.)

Twenty days by authority dated November 17, 1845, (availed himself of seven days only.)

Thirty days from October 15, 1846, extended till December 1, (returned to his post about December 7.)

Twenty days by authority dated February 23, 1847; availed himself of the leave in April and May, returning to his post about May 21.

Thirty days from January 7, 1851, (left Washington, D. C., on return to his post February 11.)

Thirty days from May 24, 1852, (left Washington, D. C., on return to his post June 26.)

From July 13 till September 18, 1852.

From July 20 till September 1, 1853; extended till October 1; extended again till November 1; returned to his post November 12.

Thirty days from May 17, 1854, (returned to his post June 10.)

Thirty days from August 6, 1854, (returned to his post September 21.)

From May 3 till September 1, 1856; extended till October 1.

October 25, 1856, date of order accepting his resignation, to take effect October 31.

I believe the foregoing statement to be a correct abstract of information to be supplied by the records of this office.

JOSEPH G. TOTTON,
Bt. Brig. Gen. Top. Eng.

Letter from War Department.

WAR DEPARTMENT,
Washington, July 14, 1858.

SIR: As requested in your letter of the 26th ultimo, I transmit, herewith, copies of all the papers within my reach relating to Major William H. Chase's claim for double rations while in command of a separate, fixed, and permanent post, and return his petition enclosed by you

Very respectfully, your obedient servant,

W. R. DRINKARD,
Acting Secretary of War.

JOHN D. MCPHERSON, Esq.,
Deputy Solicitor Court of Claims.

Letter from Major Chase.

WASHINGTON, May 2, 1856.

SIR: At the suggestion of the 2d Comptroller I enclose herewith an account for double rations, allowed to engineer officers under the act of September 28, 1850, first session thirty-first Congress, and under the decision of the 2d Comptroller, dated September 10, 1852, with the request that after auditing the account it may be sent to the 2d Comptroller for his final decision.

I am, very respectfully, your obedient servant,

WILLIAM H. CHASE,
Major of Engineers.

To R. J. ATKINSON, Esq.,
Third Auditor of the Treasury, Washington.

Account of Major Chase.

The United States to Major W. H. Chase, U. S. Corps of Engineers, DR.

Double rations, commanding Fort Barrancas, Florida, from July 1, 1851, to November 1, 1854—1,023 days, at 4 rations per day, 4,092 rations, at 20 cents per ration..	\$818 40
Double rations, commanding Fort Taylor, Florida, from November 18, 1854, to February 15, 1856—389 days, at 4 rations per day, 1,556 rations, at 20 cents per ration..	311 20
	\$1,129 60

I hereby certify that the foregoing account is accurate and just; that I have not received pay, nor drawn rations, forage, or clothing in kind, or received money in lieu of any part thereof, for any part

of the time therein charged ; that I actually owned and kept in service the horses, and employed the private servants for which I charge, for the whole of the time charged ; and that I did not, during the term so charged, or any part thereof, keep or employ as a waiter or servant a soldier from the line of the army ; that the annexed is an accurate description of my servant ; that, for the whole period charged for my staff appointment, I actually and legally held the appointment, and did duty in the department ; that I was the actual and only commanding officer at the double ration post charged for ; and that no officer, within my knowledge, has a right to claim, or does claim, for said services, for any part of the period charged ; that for the whole time brevet pay is claimed, I was on duty, and had a command according to my brevet rank, agreeably to law and regulations ; that I was actually in the command of a company for the whole time additional pay is charged ; that I have not been in the performance of any staff duty for which I claim, or have received, extra compensation during the time an additional ration is charged for ; that I have been in the United States army as a commissioned officer for the number of years stated in the charge for extra ration ; that I am not in arrears with the United States on any account whatsoever ; and that the last payment I received was from Paymaster _____, and to the _____ day of _____, 18—.

I at the same time acknowledge, that I have received of _____, paymaster, this _____ day of _____, 1856, the sum of \$1,179 $\frac{60}{100}$, being the amount and in full of said account.

WILLIAM H. CHASE,
Major Engineer.

(Signed duplicate.)

Letter from Third Auditor.

TREASURY DEPARTMENT,
Third Auditor's Office, May 3, 1856.

SIR : The enclosed letter of Major William H. Chase, United States corps of engineers, with his claim of \$1,129 60 for double rations for commanding forts Barrancas and Taylor, in Florida, from the 1st of July, 1851, to the 15th February, 1856, is herewith respectfully referred for the action of your office, of which Major Chase has been advised.

I am, very respectfully, your obedient servant,
ROBT. J. ATKINSON, *Auditor.*

P. CLAYTON, Esq.,
Second Auditor.

Letter from Second Auditor.

TREASURY DEPARTMENT,
Second Auditor's Office, May 7, 1856.

SIR : The claim of Major W. H. Chase, United States engineer corps, for double rations, under the act of 28th September, 1850, from

1st July, 1851, to 1st November 1854; and from the 18th of same month to 15th February, 1856, is herewith enclosed to you for your decision thereon.

Very respectfully, your obedient servant,

P. CLAYTON, *Second Auditor.*

J. M. BRODHEAD, Esq.,
Second Comptroller.

TREASURY DEPARTMENT,
Second Comptroller's Office, May 8, 1856.

SIR: I have received and investigated the claim of Major W. H. Chase, corps of engineers, for double rations, commencing July 1, 1851, and ending February 15, 1856.

Major Chase makes this claim under a clause in the army appropriation act for the fiscal year ending June 30, 1851, which provided for the "additional rations for the commissioned officers of engineers commanding separate and fixed or permanent posts of the army of the United States."

If it were now presented as an original question whether or not this clause granted the additional rations, without regard to the conditions prescribed by the 6th section of the act of August 23, 1842, viz: that the post should be "garrisoned with troops." I should decide it in the negative; for I cannot look upon a mere appropriation for any object as abolishing the conditions imposed by pre-existing laws for its disbursement; nor does Congress, in making an appropriation, *create, ipso facto*, an obligation to spend it.

But, in regard to the fiscal year ending on the 30th June, 1851, this question has been already adjudicated by my predecessor, Mr. Phelps; and under his decision of September 10, 1852, the allowance has been made to the officers of engineers in command of posts without troops. The abstract of this decision is stated in the printed digest (No. 227) in broader terms than the facts warranted, and would seem to imply that the appropriation in the act of September 28, 1850, was a permanent provision of law. If so, it would no doubt cover the claim of Major Chase. But neither under the original decision nor on the authority of the printed paragraph, has any such allowance been made to any engineer officer beyond the fiscal year for which the appropriation was made; nor could a wider scope be given to the law by any fair rule of construction, whatever may have been the legal effect of the appropriation for the time being, it expired with the year for which it was made.

It is not necessary to cite the action of Congress, the opinions of the Attorney General, or decisions of executive officers, as to the effect of an appropriation in authorizing payments temporarily or permanently. There is ample sanction in all for the views I have expressed, and the claim of Major Chase must of course be disallowed.

The papers are herewith returned.

I am, very respectfully, yours,

J. M. BRODHEAD, *Comptroller.*

P. CLAYTON, Esq., *Second Auditor.*

Letter from the Hon. J. A. Rockwell.

WASHINGTON, June 25, 1856.

SIR: I have been professionally consulted on behalf of Major W. H. Chase, as to the construction of sundry acts of Congress in relation to the subject of double rations to an officer of engineers, while commanding a separate or permanent post.

By a fair construction of the act, I think that he is clearly entitled to the amount which he claims. Such also seems to have been the construction given to the law by Mr. Phelps, the late second comptroller. The views, however, of yourself are different, as expressed in your written opinion given in the case. Under these circumstances, I would respectfully ask that the opinion of the Attorney General on the subject may be requested, and the papers be transmitted to him for that purpose, which I send herewith.

Very respectfully, your obedient servant,

JOHN A. ROCKWELL.

HON. J. M. BRODHEAD,
Second Comptroller.

Letter from the Second Comptroller.

TREASURY DEPARTMENT,

Second Comptroller's Office, June 30, 1856.

SIR: At the request of Mr. John A. Rockwell, acting for Major Wm. H. Chase, corps of engineers, upon whose claim I have made an adverse decision, I respectfully ask that the opinion of the Attorney General may be obtained upon the following questions:

1. Does the provision in the act of September, 28, 1850, (9 stat. 504) making an appropriation among other things for "the additional rations for the commissioned officers of engineers commanding separate and fixed or permanent posts of the army of the United States," authorize an allowance of double rations to such officers, irrespective of the condition prescribed by the sixth section of the act of August 23, 1842. (5 stat. 519,) viz: that such posts shall be garrisoned with troops?"

2. If by virtue of the appropriation in the law of September 28, 1850, engineer officers in command of posts were entitled to an allowance for double rations without regard to the condition—"garrisoned with troops" in the act of August 23, 1842, did the law of 1850 grant or continue the allowance beyond the 30th of June, 1851, no such appropriation having since been made?

I send herewith a copy of the decision of my predecessor, Mr. Phelps, in a case arising under the law of 1850, marked No. 1; a voucher presented by Major Chase for double rations as commanding a post

No. 2; a copy of my decision in Major Chase's case, marked No. 3; and the argument of Mr. Rockwell, marked No. 4.

I am, very respectfully, yours,

J. M. BRODHEAD, *Comptroller*.

HON. JEFFERSON DAVIS,

Secretary of War.

Decision of the Second Comptroller.

TREASURY DEPARTMENT,

Second Comptroller's Office, September 10, 1852.

SIR: Brevet Colonel J. R. F. Mansfield and Captain J. M. Scarritt, of the corps of engineers, are charged on the books of your office with the amount of double rations received by them; the former as commander of Fort Morgan from 1st October to 31st December, 1850, and the latter as commander of Fort Winthrop during January, 1851. From these charges they may be relieved. The act of 28th September, 1850, allows double rations to officers of engineers "commanding permanent and fixed posts." I am officially informed by the Secretary of War that these posts were of that character during the period above mentioned, and I regard the question whether a post is "*permanent*" or not as one that must always be decided by the Secretary of War, by whom they are established and discontinued. I understand the charges to have been made against these officers originally for the reason that the posts were not *garrisoned by troops*. The act above referred to does not require the posts to be garrisoned in order to entitle the officers in command to double rations. And as the allowance is expressly extended by the act to engineer officers when in command of such posts, and as officers of that corps are prohibited by the articles of war from ever commanding troops, it necessarily follows that it was the intention of Congress to give them the double rations when commanding permanent posts without garrison. Any other construction would restrict the allowance, which is expressly given, to cases which could never occur. I return all the papers connected with the subject, and am, very respectfully, yours,

E. J. PHELPS,
Comptroller.

P. CLAYTON, Esq.,
Second Auditor.

ADJUTANT GENERAL: Please report as to the nature of Major Chase's command, during the period charged in the within account.

Report of the Adjutant General.

ADJUTANT GENERAL'S OFFICE, *July 7, 1856.*

From July 1, 1851, to November 1, 1854, Major Chase is reported, on the return of his corps, as stationed at Pensacola, Florida, "super-

intending the construction of fort McRee, fort Barrancas and the barracks thereat, and with general supervision of all works on the Gulf of Mexico." From November 16, 1854, to February 16, 1856, he is reported at Key West, Florida, "in charge of construction of fort Taylor, &c." The above are separate, fixed and permanent posts.

Respectfully submitted,

S. COOPER,
Adjutant General.

Decision of the Secretary of War.

WAR DEPARTMENT, *July 10, 1856.*

The engineers engaged in superintending the construction of works of defence at permanent military posts are not under the wages of the service to be considered as commanding the posts, nor are they by the 63d article of war entitled to assume or liable to be ordered on such duty, except by the special order of the President of the United States.

There is not, therefore, such doubt as to this claim as would justify the reference asked to the Attorney General.

JEFF. DAVIS,
Secretary of War.

TREASURY DEPARTMENT,
Second Comptroller's Office, July 14, 1856.

SIR: At the request of John Rockwell, esq., acting for Major Wm. H. Chase, corps of engineers, upon whose claim for double rations while superintending the construction of fort Barrancas and fort Taylor, Florida, claiming to have been in command thereof, from 1851 to 1856, \$1,129 $\frac{6}{10}$, I had made an adverse decision, I transmitted, on the 30th ultimo, all the papers in the case to the Secretary of War with a request that he would obtain the opinion of the Attorney General on the question involved in the claim. The Secretary of War has returned the papers with the following endorsement upon them, viz:

[Copied above.]

This decision is communicated for your information.

Very respectfully, your obedient servant,

J. M. BRODHEAD,
Comptroller.

P. CLAYTON, Esq.,
Second Auditor of the Treasury.

IN THE COURT OF CLAIMS.

WILLIAM H. CHASE *vs.* THE UNITED STATES.*Petitioner's Brief.*

The petitioner was commissioned as a major in the corps of engineers in the army of the United States on the 7th July, 1838. From 1842 to the date of his resignation, which took effect on the 31st October, 1856, he performed duty and was engaged at different stations, as shown in the report of General Totten, on pages 3 and 6 of the record. During that period he received, for one year, double rations as being "in command of a separate, fixed, and permanent post." For the rest of the time the allowance of double rations has been refused, although having during most of the period a similar, and during a part of the time the *same*, command.

As there is no dispute in relation to the facts, the question is one of law, and whether Major Chase was, during the period above stated, or any portion of it, entitled to double rations beyond the amount received for the one year above referred to?

It is contended that, in order to be entitled to such rations, it must appear that he was the commandant of a permanent or fixed post, "garrisoned with troops," in accordance with the provisions of the 6th section of the act of Congress of the 23d August, 1842. (5 Stat. at Large, 513.)

To this, we apprehend, a conclusive answer is furnished by the provisions of the act of Congress of September 28, 1850, (9 Stat. at Large, 504;) but independent of that act there are strong and, as we think, sufficient reasons against that construction of the act of 1842 which would exclude Major Chase from the benefit of double rations.

The 4th section of the act of March 3, 1797, (1 Stat., 508,) prescribed "that, to the brigadier while commanding in chief, and to each officer while commanding a separate post, there shall be allowed twice the number of rations to which they would otherwise be entitled;" and by the 5th section of the act of 10th March, 1802, (2 Stat., 124,) "to the commanding officer of each separate post such additional number of rations as the President of the United States shall from time to time direct, having respect to the special circumstances of each post."

At the time of the passage of the first of these acts, the corps of engineers had not been established as a distinct corps in the army, but was established by the second of these two acts by the provisions of the 26th section. (2 Stat., 137.) Prior to the passage of these acts, the engineers were attached to and formed a part of the corps of artillery, and as such was entitled to all the advantages and emoluments of that branch of the army. In relation to these engineer officers, on the 10th April, 1806, it was provided in the Rules and Articles of War, (2 Stat., 367:) "The function of the engineer being generally confined to the most elevated branch of military science, they are not to assume, nor are they subject to be ordered upon, any duty beyond the line of their immediate profession," &c.

It thus appears that the officers belonging to this corps, belonging to "the most elevated branch of military science," could not by law be placed in the command of troops, and that, however high their rank, however important the post assigned to them, or valuable their services, such a construction is claimed to be given to the act of 1842 as would exclude them from the benefits of double rations granted to the other corps of the army.

It is contended that a just and fair view of all the legislation on this subject leads to no such results. Under the act of Congress of July 5, 1828, (3 Stat., 256,) it is provided "that the pay and emoluments of said corps (engineers) shall be the same as those allowed to the officers of the regiment of dragoons."

The act of the 2d March, 1833, (4 Stat., 652,) provides for the establishment of the regiment of dragoons, and its pay, &c., and that "the same allowances and benefits, in every respect, as are allowed to other troops constituting the present military establishment."

It is not to be presumed that the purpose of the act of Congress of 1842 was to make this invidious and unjust distinction between the engineer and other corps of the army; and that after having declared it to be a distinguished band in the public service, prevented its officers from commanding troops, and declared that they should have the same "pay and emoluments," and "the same allowances and benefits with the other troops," that the purpose was to exclude them as a body from such benefits and emoluments.

The acts of 3d March, 1797, and 16th March, 1802, were the only acts referred to in the act of the 23d August, 1842. When these acts were passed there was no engineer corps in existence, and they had only reference to the other corps of the army which had the command of troops, and which were the only officers to whom the act could apply. It is not a just and fair construction of this act that the restriction "to the commandant of each permanent and fixed post, *garrisoned with troops*," was intended only for the officers of such corps as could by law be the commandants of troops, and not to officers of the engineer corps? The construction which had been given by the highest officer of the government to the provisions of law in relation to the pay of officers of engineers holding a brevet rank and commanding a separate post, greatly strengthen the views now taken.

But, in addition to such authority, we have the opinion in support of the views now presented in an analogous case of a court of high authority.

The regulations of the army issued under the authority of law in 1826, in the 1,140th article provided: "When troops are detached to points where there is no assistant commissary of subsistence, the commanding officer of the post or detachment may appoint an officer to do that duty, who will while acting be entitled to the pay of an assistant commissary of subsistence; but as such appointments are only made to meet the casualties of service, the officer thus appointed will not be considered on pay after he has ceased to perform the duties. Officers making such appointments will forthwith report them to the commissary general of subsistence."

Major Richard Delafield, of the engineer corps, had the charge of

the construction of military works at Fort Jackson, having of course no troops under his command, but a large number of laborers employed in the construction of the work. He performed himself the duties of assistant commissary of subsistence, and charged in his accounts the regular charge of \$20 per month for the service. A suit was brought against him before the district court of the United States for the southern district of New York; this, with other claims, were interposed as a set-off. The district judge decided in favor of the allowance of the charges. He said: "The promotion of the defendant to the rank of captain, while he was rendering said service, did not alter or defeat his claim to the compensation therefor charged by him; the law of the United States, and the rules and regulations of the army on which the defendant rested his claim, were as applicable to him while acting at said post as a captain as while acting as lieutenant, and if a part of the troops at said post were military convicts or persons in the service of the United States as a part of said corps, and the supplies were issued to them as charged, the defendant was entitled to the compensation."

After an examination of the case, Judge Thompson confirmed this decision. The case was brought by writ of error to the Supreme Court, and being equally divided in opinion on the case, the decision of the court below was affirmed. This case was on the docket of the Supreme Court of the United States in 1844, and by a reference to the printed record of the case, the ground of the decision will more fully appear. (December term, 1844, No. 19.)

But in addition to this, by reference to House Doc. No. 18, 1st sess. 28th Congress, it will appear that in more than twenty instances a similar construction was given by the Treasury Department to this very regulation, and the charge of twenty dollars per month paid to officers of engineers, acting as assistant commissaries of subsistence, having *laborers*, but no troops under their command. These regulations, having been issued under the express authority of acts of Congress, had the force of law.

The same just and sound exposition of the law in relation to the same class of officers, and the same forms of expression given in the foregoing cases by the court and Treasury Department, would lead to the construction now contended for, and show that, independent of any legislation subsequent to the act of August 23, 1842, he would be entitled to double rations.

In view, however, of the act of Congress of the 28th September, 1850, (9 Stat., 504,) it would seem that there could be no doubt on the subject. That act is an appropriation bill, and in the first section is the following paragraph:

"For commutation of officers' subsistence, five hundred and fifty thousand six hundred and seventy-nine dollars, including the additional rations for commissioned officers of ordnance commanding arsenals, being fixed or permanent posts of the army of the United States, and *the additional rations for the commissioned officers of engineers commanding separate and fixed or permanent posts of the army of the United States.*"

It would seem difficult to use language more explicit or more dis-

tinctly showing that it was the understanding of Congress that "the officers of engineers commanding separate and fixed or permanent posts of the army of the United States" were entitled to "the additional rations." Was it a *gratuity* that Congress designed to grant to these officers? On the contrary, it was the most distinct and positive legislative recognition of the *legal rights* of the officers to the "additional rations." It is the more significant from the fact, that almost the very language of the act of 1842 is used, showing that it was by no inadvertence, but of set purpose, that this distinct and clear recognition of the legal rights of the officers was adopted. What renders the course on this occasion the more extraordinary is, that under the provisions of this law Major Chase and the other officers of the engineer corps have been allowed the rations for one year.

This clear and obvious view of the subject was taken by Mr. Comptroller Phelps, in his decision of 16th September, A. D. 1852; but the present Comptroller is of a different opinion; and it is understood that the objection now is, that, being an appropriation bill, the act had no force beyond the year for which the appropriation was made. It of course will not be contended that provisions of a general character may not be introduced into an appropriation bill, nor that such provisions are necessarily void or inoperative. Every one knows that legislation of the utmost importance, with no limitation of time, is constantly introduced into the appropriation bills; nor, on the other hand, shall I contend that there are not many provisions which are merely temporary annual provisions, which are not of a permanent character. There is no general and uniform rule on the subject, and the true interpretation of the provisions of an appropriation act is to be arrived at in the same manner as in relation to any other law.

It is very true that this particular appropriation was but for a single year; but the *terms* in which the appropriation was made were a distinct and positive construction of the act of 1842; a clear declaratory law, in perfectly unambiguous language. The *fact*, too, that such an appropriation was made, and for such a purpose, speaks in the clearest and strongest language on the subject. It was appropriated not as a *gratuity*, but as a *legal claim*; and if a legal claim, under what law? It was granted not as a *favor* to *one*, but as a *right* to all, in the payment of a *recognized well understood official duty* of a class of officers belonging to the army.

It would seem that no two minds could differ as to the force and effect of this provision, and that no argument could make the construction more clear.

But, what renders the objection to this claim the more remarkable, is the construction which has been given to other provisions in this very act, and the very section of the act under consideration.

The paragraph immediately preceding the one in question is as follows:

"For pay of the army, one million seven hundred and fifty-nine thousand eight hundred and forty-two dollars, 'provided that the pay and emoluments of the superintendent of the United States Military Academy shall in no case be less than the pay and emoluments of the professor of natural and experimental philosophy.'"

Now, this provision for the professor was not in the fulfilment of the obligations of any previous law, nor in the construction of a previous law. It might well have been considered and treated as a temporary provision for the year ; but, on the contrary, it was considered as permanent, and is still in force.

Again, in the same act, there is the following provision :

“ For the current expenses of the ordnance service, one hundred thousand dollars, provided that the principal assistant in the ordnance bureau of the War Department shall receive a compensation not less than that of the person employed at the foundries, under the fifth section of the act approved twenty-third of August, eighteen hundred and forty-two, from and after the date thereof.”

Now, this provision is somewhat equivocal ; but the assistant in the ordnance bureau properly, doubtless, to this day enjoys the benefit of the construction of this as a permanent provision, certainly for far less reason than in the present case.

But the most extraordinary matter of all is, the different course which has been taken in relation to the two classes of officers in one short paragraph, and with the same phraseology. The whole paragraph is as follows: “ For commutation of officers’ subsistence, five hundred and fifty thousand six hundred and seventy-nine dollars, including the additional rations for commissioned officers of ordnance commanding arsenals or armories being fixed or permanent posts of the army of the United States, and the additional rations for the commissioned officers of engineers commanding separate and fixed or permanent posts of the army of the United States.”

It is thus seen that the language in relation to the engineer officers and in relation to the ordnance officers is identical ; and yet since the passage of that act the ordnance officers have been decided to be entitled to double rations, and the engineers not. It is said, indeed, that the “ enlisted men ” of the ordnance corps are to be regarded as *troops*.

If so, what was the necessity of passing this declaratory law, and why were they not paid under the act of 1842 ; and *now*, if they are entitled under the act of 1842, why are they not paid the whole amount of their back pay from that time ?

If the act of 1842 was sufficient, this of 1850 is unnecessary. If it was insufficient, why this provision in an appropriation bill resorted to to help it out, and how can it help it out any better in relation to ordnance officers than in relation to engineers ? But there is certainly no real difference in the two classes of officers, so far as the law of 1842 is concerned.

It is, indeed, provided in the act of February 8, 1835, section two, “ that the colonel or senior officer of the ordnance department is authorized to enlist for the service of that department for five years, as many master armorers, master carriage makers, master blacksmiths, artificers, armorers, blacksmiths, and laborers, as the public service, in his judgment, under the direction of the Secretary for the Department of War, may require.”

Now, it certainly requires as liberal a construction to turn an arsenal with “ enlisted mechanics ” into a “ *fort garrisoned with troops*,” as it

does to the laborers engaged in the construction of a fortification under the charge of an engineer officer.

If the construction which we give of the paragraph in the appropriation bill of 1850 is sound, and amounts to a permanent recognition of the validity of the claim of the ordnance officers, that act is quite sufficient to sanction the claim of both classes of officers; but if it cannot be considered as a recognition for the one, it certainly cannot be for the other.

JOHN A. ROCKWELL,
Of Counsel for Petitioner.

IN THE COURT OF CLAIMS.

WILLIAM H. CHASE *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF ON FINAL HEARING.

Claim by an officer of the engineer corps, who was superintending the construction of forts on the Gulf of Mexico, for double rations, on the ground that he was in command of a military post.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. That on the 7th of July, 1838, the claimant was commissioned a major in the corps of engineers, and so continued until he resigned, October 31, 1856.

Second. That from December 13, 1848, to November 1, 1854, he was "stationed at Pensacola, Florida, charged with the construction and repairs of the forts in Pensacola harbor, and the general supervision of all works of fortification on the Gulf of Mexico;" and from November 18, 1854, to February 16th, 1856, he was "stationed at Key West, and charged with the construction of Fort Taylor, and the general supervision of fortifications on the Gulf of Mexico."—(Gen. Totten's statement, Record, p. 4.)

Third. The claim is for double rations from July 1, 1851, to November 1, 1854, and from November 18, 1854, to February 15, 1856. (Account, Record, p. 7.)

Fourth. There is no evidence that Major Chase exercised any command of troops, or any other authority, except such as is usual when constructing fortifications and the public works.

Fifth. That the claim is based by the claimant upon the act of 1842, (5 U. S. L., 513,) and 1850, (9 U. S. L., 504,) and upon no other law. (Petition, Record, p. 3.)

LEGAL PROPOSITIONS.

FIRST. *The act of August 23, 1842, (5 U. S. L., 513, §6,) authorizes rations to officers commanding fixed military posts garrisoned with troops.*

This section of the act declares that rations authorized to be allowed by the act of 1797 "shall hereafter be allowed to the follow-

ing officers, and *no others*: to the major-general commanding the army, and to every officer commanding-in-chief a separate army, actually in the field; to generals commanding the eastern and western geographical divisions; to the colonels or other officers commanding military geographical departments; to the commandant of each *permanent or fixed post garrisoned with troops*, including the superintendent of the Military Academy at West Point, who is regarded as the commandant of that post."

Major Chase does not show that he was in command of a permanent or fixed "post garrisoned with troops." Such an employment as he exercised has never been held to be included and provided for under this section. And even the decision of Mr. Phelps does not rest upon this act, because he expressly puts it upon that of 1850. Major Chase did not, in fact, command a post, nor did he command a garrison of troops. He was in command as an engineer, which conferred no such authority.

The 63d Article of War (2 U. S. L., 367) prescribes some of the duties of an engineer, and shows that the President alone can give him a command outside of his usual and regular official duty. That article is as follows:

"ARTICLE 63. The functions of the engineers being generally confined to the most elevated branch of military science, they are not to assume, nor are they subject to be ordered on any duty beyond the line of their immediate profession, except by the special order of the President of the United States, but they are to receive every mark of respect to which their rank in the army may entitle them, respectively, and are liable to be transferred, at the discretion of the President, from one corps to another, regard being paid to rank."

Military dictionaries and works describe an engineer as "an officer appointed to inspect and contrive attacks, defences, &c., of a fortified place, or to build and repair them." (*Duane, Mil. Dic.*, 136.)

These references show what were Major Chase's official duties. He does not show that he had a command conferred by order of the President, or even by anybody else. Hence, it is clear that under this act of 1842 he cannot receive double rations.

SECOND. *The act of 28th September, 1850, (9 U. S. L., 504,) was in force only for the year ending the 30th June, 1851, and does not apply.*

The act of 1850 is entitled "An act making appropriations for the support of the army for the year ending the thirtieth of June, one thousand eight hundred and fifty-one."

The third paragraph is in these words:

"For commutation of officers' subsistence, five hundred and fifty-six thousand six hundred and seventy-nine dollars, including the additional rations for commissioned officers of ordnance commanding arsenals or armories, being fixed or permanent military posts of the army of the United States, and additional rations for the commissioned officers of the engineers commanding *separate and fixed or permanent posts* of the army of the United States."

This act by its terms was limited to the appropriation for a particu-

lar year, and under it Major Chase received the double rations he claimed. It cannot, by any possibility, extend to any other appropriation.

But even under that law he was not legally entitled, because he did not exercise that command which authorized it. The reasoning of Mr. Phelps is wholly unsatisfactory. He does not show that the officers to whom he refers had a "command" at all. He only says that the War Department had informed him the posts where they were stationed or employed were "permanent." Admitting that to be so, it did not show that they held an official command there when not ordered by the President. But it is now unimportant whether that decision was right or not, because that law has performed its functions and is dead, and cannot have any further effect.

It follows that Major Chase cannot lawfully receive the double rations he claims, because there is no law authorizing it.

R. H. GILLET, *Solicitor*.

SEPTEMBER 2, 1858.

IN THE COURT OF CLAIMS.

June 6, 1859.

WILLIAM H. CHASE *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

This is a claim for double rations by the claimant as a major of the corps of engineers. The time for which the claim is made is from the 23d of August, 1842, to the 16th of February, 1856, one year excepted, viz: the year commencing on the 1st July, 1850, and ending on the 30th June, 1851. There is proof that the claimant was a major in the engineer corps during said period.

It also appears that for most of the time from the 23d of August, 1842, until the 1st of July, 1851, he was stationed at Pensacola, in Florida, charged with the construction and repairs of the forts in Pensacola harbor, and the general supervision of all works of fortification on the Gulf of Mexico; that from the 1st of July, 1851, to November 1, 1854, he was stationed at Pensacola aforesaid, superintending the construction of Fort McRea, Fort Barrancas, and the barracks thereat, and with a general supervision of all works on said Gulf; that from the 16th of November, 1854, to February 16, 1856, he was at Key West, Florida, in charge of the construction of Fort Taylor, &c.; and that the above are separate, fixed, and permanent posts.

The petition states that this claim was presented to the accounting officers and to the Secretary of War, and payment refused. But that is true only as to part of the time. There is no proof of the claim having been so presented and refused for the period from the 23d of August, 1842, to the 1st of July, 1851.

The following is the claim presented to the Department by the claimant:

“Double rations, commanding Fort Barrancas, Florida, from July 1, 1851, to November 1, 1854, 1,023 days, 4 rations per day, 20 cents per ration, \$818 40.

“Double rations, commanding Fort Taylor, Florida, from November 18, 1854, to February 15, 1856, 389 days, 4 rations per day, 1,556 rations, 20 cents a ration, \$311 20. Amount, \$1,129 60.”

We think that it is perfectly clear that the claim as to the period from the 23d of August, 1842, to July 1, 1850, is without foundation. The act of Congress which governs the claim, so far as least as that period is concerned, is as follows :

“That the rations authorized to be allowed to a brigadier while commander-in-chief, and to each officer while commanding a separate post, by the act of March 3, 1797, and to the commanding officers of each separate post, by the act of March 16, 1802, shall hereafter be allowed to the following officers, and no others : to the major general commanding the army, and to every officer commanding in chief a separate army actually in the field ; to the generals commanding the eastern and western geographical divisions ; to the colonels or other officers commanding military geographical departments ; to the commandant of each permanent or fixed post garrisoned with troops, including the superintendent of the Military Academy at West Point, who is regarded as the commandant of that post.” (5 Stat. at L., 513.)

The claimant, during the last named period, as an engineer officer, was stationed at separate, fixed, and permanent posts, and was charged with the construction and repairs of forts there, and with the supervision of other works of fortification. But his having such charge does not bring him within said act of Congress, because the posts at which he was stationed were not, nor was any one of them, garrisoned with troops, over which troops he had the command.

By the army regulations of 1836 double rations were allowed certain officers, and, among others, “to the commandants of military posts and arsenals,” and “to the officers of the corps of engineers, and of the topographical engineers, charged with the superintendence of fortifications and other public works, and having separate commands.” The same allowance was made to those officers, and in the same words, by the army regulations of 1841. But Congress, by said act of 1842, put an end of those extra allowances to engineers for such services.

We come now to consider the claim for the period from the 1st of July, 1851, to the 16th of February, 1856.

On the 28th of September, 1850, Congress passed an act on which, with the aforesaid act of 1842, the claimant relies for this claim. If the claim for the period last above named can be supported, it must be on the said act of 1850 ; because the act of 1842, except so far as it may be affected by that of 1850, is as decidedly against this part of the claim as it is against the other, the facts being the same as to the nature of the service during the whole time alleged in the petition.

The said act of 1850, which is an appropriation act for the support of the army, contains the following provision :

“That the following sums be, and the same are hereby, appropriated * * * for the support of the army for the year ending the 30th June, 1851 ; * * * for commutation of officers’

subsistence, \$550,679, including the additional rations for commissioned officers of ordnance commanding arsenals or armories, being fixed or permanent posts of the army of the United States, and the additional rations for the commissioned officers of engineers commanding separate and fixed or permanent posts of the army of the United States." (9 Stat. at L., 504.)

We need not stop to inquire whether this enactment respecting engineers is a permanent one, or is limited in its operation to the single year; because, if it be considered permanent, its operations will not benefit the claimant. One of the articles of war is as follows:

"The functions of the engineers being generally confined to the most elevated branch of military science, they are not to assume nor are they subject to be ordered on any duty beyond the line of their immediate profession, except by the special order of the President of the United States; but they are to receive every mark of respect to which their rank in the army may entitle them, respectively, and are liable to be transferred, at the discretion of the President, from one corps to another, regard being paid to rank." (2 Stat. at Large, 367, art. 63.)

Now, it is not proved, nor is there any reason to suppose, that the claimant was commanding any of the said posts by the special assignment of the President of the United States, or in any other way. Indeed, the evidence shows that he was not so commanding. He was, at the times referred to in the evidence, superintending in the capacity merely an engineer the construction and repairs of certain forts, with a general supervision of others, and that is all. The performance of such engineer duties was not the exercise by the special assignment of the President, or in any other way, of such a military command of a separate and fixed or permanent post as is contemplated by said act of 1850.

Our opinion, therefore, is, that the claimant has no cause for action.

RICHARD STEENBURG.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

RICHARD STEENBURG *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's original evidence, transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. s.] seal of said court, at Washington, this 5th day of December, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable judges of the Court of Claims of the United States:

The petition of Richard Steenburg, of Stockholm, in the county of St. Lawrence, in the State of New York, begs leave respectfully to represent unto this honorable court that he is interested in and is the owner of a claim which he has against the United States, arising from the consideration that, on or about the 2d day of March, A. D. 1813, the United States pressed into its service two span of horses, sleighs, and harness of his, with himself and driver, and employed

them in transporting troops and military stores from Alburg, Vermont, to Plattsburg, New York, and from Plattsburg to Sackett's Harbor, and detained them thirty-two days, and so used them that one of said horses died. And for this service and loss your petitioner claims that he is justly entitled to be paid \$120, the value of said horse, and two dollars per day for each span of horses and their drivers for said thirty-two days' service, amounting in all to two hundred and forty dollars, besides interest, crediting the United States with six dollars received; and therefore prays this honorable court will examine and hear said claim and such proof as he may have to offer in support thereof, and that they report a bill to Congress for the payment of said claim, with the interest from the time of service. And your petitioner, as in duty bound, will ever pray.

RICHARD ^{his} + STEENBURG.
mark.

Dated Stockholm, August 4, 1855.

STATE OF NEW YORK, }
County of St. Lawrence, } ss:

Richard Steenburg, of Stockholm, in the county of St. Lawrence, in the State of New York, being duly sworn, doth depose and say that the petition above by him subscribed contains the truth, according to the best of his information and belief.

RICHARD ^{his} + STEENBURG.
mark.

Sworn and subscribed before me this 4th day of August, A. D. 1855.

D. B. DRAKE,
Justice of the Peace.

IN THE COURT OF CLAIMS.

RICHARD STEENBURG vs. THE UNITED STATES.

Schedule of claimant's evidence.

1. The deposition of George Weekes, as taken and returned by the United States commissioner of the Court of Claims for the county of Clinton, New York.

2. The deposition of Willim Aubrey, as taken and returned by the same commissioner.

SIR: Please take notice that the testimony on the part of the claimant is closed, and the original testimony so taken and closed is on file with the clerk of this court. Dated December 9, 1858.

Yours, &c.,

C. K. AVERILL,
Attorney for claimant.

DANIEL RATCLIFFE, Esq.,
Assistant Solicitor U. S. Court of Claims.

COURT OF CLAIMS.

RICHARD STEENBURG, claimant, *vs.* THE UNITED STATES.

Interrogatories to be put to George Weekes, a witness offered on the part of the claimant in the above entitled cause.

1. Do you know the parties, or either of them, entitled in this action?

2. When and where did you first know the claimant? State, if you know, what team service he ever performed for the United States, and how and in what manner, whether voluntary or involuntary, and all the circumstances attending the service from the beginning to the end; the time he left with his team, and when he returned, and, of you know, what usage his said team received, and if one of his horses sickened and died by the severity of the compulsory usage. What you know on this point state fully.

3. What value do you attach to the horse in question?

4. State who the agents were in the impressment of the team, and how you came to know anything about it.

5. If you know what number of days he was engaged with his team, state the same, and what value was attached to that service per day for a man, two horses, and a sleigh.

C. K. AVERILL,
Attorney for claimant.

Cross-interrogatories.

No questions at present. If, after the deposition comes in, the government thinks it necessary to re-examine the witness, the right to do so is reserved.

D. RATCLIFFE,
Assistant Solicitor of the Court of Claims.

COURT OF CLAIMS.

RICHARD STEENBURG, claimant, *vs.* THE UNITED STATES.

Depositions of George Weekes and William Aubrey, witnesses produced, sworn, and examined on oath on the 25th day of October, A. D. 1858, at my office, in the town of Champlain, in the county of Clinton and State of New York, by virtue of the annexed consents or stipulations.

George Weekes, of Rouse's Point, in the county of Clinton, in the State of New York, aged 67 years, a witness produced, sworn, and examined on the part and behalf of the claimant, Richard Steenburg, deposeth and saith as follows:

Imprimis. To the first interrogatory this deponent saith: I know the parties.

To the second interrogatory he answers: I knew the claimant before the war of 1812, with Great Britain, at Alburg, in the State of Vermont. In the forepart of the month of March, 1813, I was residing in Champlain, in the State of New York, nearly opposite to where claimant lived, Lake Champlain dividing us. On or about the 8th day of March, 1813, a United States officer and eight men, soldiers of the regular army, came to my house in Champlain, accompanied by William Hicks, a custom-house officer, who pointed out to the United States officer where persons owning teams resided. The said officer then said to me, "your team I want, and shall take; if you do not drive it I will furnish a driver." I then got up my horses and sled, the officer and men got in, and the officer ordered me to drive across the lake to Alburg. I obeyed, and drove to claimant's house. The United States officer then proceeded to press into the United States service other teams; he pressed claimant's two span of horses and sleighs; the claimant drove one span and Moses J. Jenner drove the other span. They were then ordered to drive to Champlain village, and they did so. From there they were ordered to Plattsburg, where they remained several days awaiting orders. General Pike's command was at Plattsburg. The teams in question were loaded with United States soldiers, a portion of the United States sixth infantry, called the "saucy sixth." From Plattsburg they proceeded with their loads to Sackett's Harbor. The teams were used very harshly, and badly fed; the roads were bad, and many horses gave out; they were compelled to go as long as they could stand to go; the teams were unequally loaded. I knew that one of claimant's teams was heavily loaded, and one of his horses gave out in returning. I administered medicine to him, but he continued to fail. The sickness of the horse was occasioned, in my judgment, by overloading and shortness of fodder in going, and pressing them beyond their strength. The United States paid three dollars per day and found the teams. I heard that the horse of claimant died, after he got home, from the effects of the journey. Claimant was the owner of the teams, and each team was employed thirty-two days.

To the third interrogatory I answer: From my knowledge in question, I value him at \$125.

To the fourth interrogatory he answers: The name of the officer who pressed the team I have forgotten; they all wore the United States uniform. At Plattsburg we were under the command of General Pike, a United States officer.

To the 5th interrogatory he answers: I have stated all I know of the matter in the second interrogatory; has no interest in this claim, nor related to claimant, and have resided for the last year at Rouse's Point, and knows no other matter or thing relative to the claim in question.

GEORGE WEEKES.

Subscribed and sworn to before me October 25, 1858.

H. G. ROBBINS,

Commissioner of the U. S. Court of Claims.

COURT OF CLAIMS.

RICHARD STEENBURG, claimant, *vs.* THE UNITED STATES.

Interrogatories and cross-interrogatories to be administered and answers taken from William Aubrey, a witness offered on the part of complainant in the above entitled cause.

Direct examination.

1. Do you know the parties, or either of them, entitled in this action?

2. Do you know that the complainant ever performed any service for the United States? If you do, state the time, and place, and all the circumstances attending the same; if it was voluntary or involuntary; with what he performed the service, and what injury befell his team in said service; and how it occurred, if the service was team service.

3. If he was forced into the service, by whom was it done, and who were the agents?

4. What value do you attach to the loss of the horse composing a part of his team?

5. If you know the number of the days he was employed with his team, state the same, and how much per day it was worth.

Cross-examination.

No questions at present. If, after the deposition comes in, the government should think it necessary to re-examine the witness, the right to do so is reserved.

D. RATCLIFFE,
Assistant Solicitor of the Court of Claims,

IN THE COURT OF CLAIMS.

RICHARD STEENBURG, claimant, *vs.* THE UNITED STATES.

William Aubrey, of Dundee, Canada East, aged sixty-four years, a witness produced, sworn, and examined on the part and behalf of the claimant, Richard Steenburg, deposeth and saith as follows:

Imprimis. To the first interrogatory he answers: I know the parties.

To the second interrogatory he answers: In March, A. D. 1813, I was living a near neighbor to the claimant in Alburg, Vermont. On or about the 8th of March, 1813, a United States officer with eight soldiers came to Alburg, and pressed the teams of claimant and deponent's teams, and ordered them to drive to Champlain and from Champlain to Plattsburg, which orders they obeyed. Claimant went with and drove one span of his horses, and hired Moses J. Jenner to

drive the other span. On their arrival at Plattsburg they were placed under the military orders of General Pike. When General Pike's army moved, a portion of his command was ordered into claimants and deponent's sleighs, and proceeded to Sackett's Harbor. They were discharged at Watertown. The United States paid me for thirty-two days at three dollars per day and found. They did not pay all the teamsters then for want of money. Claimant was only paid six dollars for his two teams, and he performed the same service that I did and for the same length of time, thirty-two days. I lost one of my horses by hard usage, and one of claimant's horses died, after reaching home, from hard usage in overloading and pushing them beyond their strength, and the United States failing to furnish the necessary provender on the road.

To the third interrogatory he answers: The service was involuntary. I have before stated by whom and what agents the service was promised to be rendered; their names were never made known to me.

To the fourth interrogatory he answers: I value the horse lost in this service belonging to this claimant at one hundred and twenty-five dollars.

To the fifth interrogatory he answers: I have before stated the number of days claimant's teams were employed. Deponent is sixty-four years old; has no interest in this claim, and not related to claimant, and has resided the last year in Dundee, Canada East, and knows nothing further material to this issue.

his
WILLIAM + AUBREY.
mark.

Subscribed and sworn to before me October 25, 1858.

H. G. ROBBINS,
Commissioner of the United States Court of Claims.

STATE OF NEW YORK, *County of Clinton, ss:*

On this 25th day of October, A. D. 1858, personally came George Weekes and William Aubrey, the witnesses within named, and after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner and then proposed by him to the witnesses; and the answers thereto were written down by the commissioner in presence of the witnesses, who then subscribed the depositions in the presence of the commissioner. The depositions of George Weeks and William Aubrey, taken at the request of Richard Steenburg, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of said Steenburg. The adverse party was notified, did not attend, and did not object, but reserved the right to cross-interrogatories on the coming in of the answers.

H. G. ROBBINS,
Commissioner of the United States Court of Claims.

IN THE COURT OF CLAIMS.

No. 318.

RICHARD STEENBURG vs. the United States.

CLAIMANT'S POINTS AND BRIEF

Statement.

General Pike, the agent of the United States, in command of the United States army on the northern frontier at Plattsburg, in the war of 1812, sent out United States soldiers with an officer from his command to impress teams for transporting his army to Sackett's Harbor, and among others, impressed the teams of the claimant, consisting of two span of horses, sleighs and harness, and detained them thirty-two days, and so used them that one of said horses died, and turning him away unpaid for the services performed and loss sustained in one of his horses.

The United States are liable for the injury to the team, &c.

They are also liable for the use of the team, and for the amount of the ascertained aggregate value, made out in the testimony of George Weekes, at page 5 of the Record, and William Aubrey, at page 7 of the Record. In detail, the account against the United States stands thus:

To two span of horses, sleighs, harness, and drivers, 32	
days each, at \$3 per day.....	\$192 00
To horse valued at.....	125 00
	317 00
Deduct paid.....	6 00
	311 00

The grounds of liability are—

I. The impressment was the act of the authorized agent of the United States, who was carrying on a war with Great Britain; and in support of the fact of agency, reference is made to the 2d volume American Military and Naval Heroes, page 23, from which the following is extracted:

“Immediately after the declaration of war, Pike was stationed with his regiment upon the northern frontier, and, upon the commencement of the campaign of 1813, was appointed a brigadier general.”

Page 24: “He was selected for the command of the land forces in an expedition against York, the capital of Upper Canada, and on the 25th of April sailed from Sackett's Harbor.”

Also see American State Papers, Claims, page 874: “Philip B. Robert's charge of building barracks for Gen. Pike's troops, at Plattsburg, December 1812,” &c.

“ It follows that the nation is liable for the acts of such agents as it sees fit to employ in the prosecution of its object.” Per Gilchrist, C. J., in the case of *The Owners of the brig Armstrong vs. The United States*.—(See Devereux’s Reports, page 172.)

II. It being the act of the United States, the fifth article of the amended Constitution of the United States secures to the owner just compensation for property taken for public use.—(See U. S. Statutes at Large, vol. 1, page 21.)

The just compensation meant is to make whole; and this cannot be done without applying the same remedy against the United States that the claimant could legally exact in an action of trover from an individual who converts the property of another, with interest from the time of conversion.

It was the duty of the agents to have paid the whole when the service was rendered and the loss sustained. This was not done. (See answer to 2d interrogatory from witness Aubrey, page 7 of the Record.)

III. It is the custom of Congress to provide for such claims.—See Special Acts, viz: Henry Knowles, (impressed,) 24th Cong. 1st sess., Feb. 17, 1836; A. J. King, (impressed,) 26th Cong. 1st sess., July 21, 1840, 6; George Miller, (impressed,) May 8, 1820; Andrew Moore, (impressed,) Feb. 5, 1833; Theophilus Cooksey, (impressed,) 21st Cong. 1st sess., Jan. 30, 1830; David Fielding, (impressed,) 19th Cong. 2d sess., March 2, 1827.

C. K. AVERILL,
Attorney for Claimant.

IN THE COURT OF CLAIMS.

RICHARD STEENBURG *vs.* THE UNITED STATES.

SOLICITOR’S BRIEF.

Claim for the use of teams and the loss of a horse impressed into the service of the United States at Alburg, Vermont, in 1813.

FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. That in 1813 the plaintiff resided at Alburg, Vermont, and a certain officer, who, from his dress, was believed to be in the service of the United States, required the use of his horses and sleighs for the purpose of transportation of soldiers to Champlain, Plattsburg, and Sackett’s Harbor, in the State of New York.—(Weekes’ ev., Record, p. 5.)

Second. That the plaintiff and a person who was in his employ went with the teams, and were absent thirty-two days, laying several days at Plattsburg waiting orders.—(Weekes’ ev., Record, pp. 5, 6.)

Third. That, in the opinion of the witness, the teams were heavily loaded and were not well fed, but he states no facts to sustain either. (Weekes’ ev., Record, p. 6.)

Fourth. The United States found the teams and paid three dollars per day for the use of them.—(Weekes' ev., Record, p. 6; Aubrey's ev., Record, p. 7.)

Fifth. One of the plaintiff's horses died after his return.—(Aubrey's ev., Record, p. 7.)

Sixth. The witness is of the opinion that the horse died of hard usage, but he states no facts on which he formed this opinion.—(Aubrey's ev., Record, p. 7.)

Seventh. One of plaintiff's witnesses assumes that plaintiff was not fully paid, but this is a negative that he could not know.

Aubrey testifies: "The United States paid me for thirty-two days at three dollars per day and found. They did not pay all the teamsters then for want of money. Claimant was only paid six dollars for his two teams, and he performed the same service that I did, and for the same length of time—thirty-two days."—(Record, p. 7.)

From this testimony it would seem that Aubrey knew that six dollars were paid to plaintiff and that he knew nothing more of the matter of payment. It was not possible for him to know that the plaintiff was not paid, nor could he know all that occurred between him and the officers under whose direction he served.

If the officer had not money to pay, he would have given the plaintiff a certificate of his service and the amount due, and, probably, an order upon the quartermaster for the balance due. If only six dollars were paid to meet expenses on his return home, he doubtless received some such evidence of his right to compensation, which he subsequently realized in money.

This conclusion is much strengthened by the following.

Eighth. There is no evidence that plaintiff ever called upon the Department of War, or any officer of the government, to pay him for his services; nor does he show that he ever applied to Congress for pay although nearly forty-six years have since elapsed.

LEGAL PROPOSITIONS.

FIRST. *There is no law authorizing the payment of this claim.*

The law of 1816 (3 U. S. L., 261—264) does not authorize the payment of claims unless presented within two years from its date; but if it did it would not extend to the payment for the use of teams. That act, throughout its provisions, supposes that the use of all teams had been fully paid for by the officers at the time, and it made provision for other matters—that is, the loss of horses, &c., while in the service, without the fault of the owner, and the like cases.

SECOND. *From the circumstances the presumption is, that the services for which the plaintiff claims were paid for at the time.*

The negative statement of the witness Aubrey proves nothing. He does not swear that he was present at a settlement between the officer and the plaintiff, nor does he state his means of knowing about the transaction. His statement is likely to rest upon hearsay, or the plaintiff's own allegation. Why the witness was fully paid and the plain-

tiff not, is not shown. We have no evidence of how the business was actually transacted by the parties at the time.

The silence of the plaintiff for nearly forty-six years, without applying to the departments or Congress for pay, strengthens the presumption that the matter was properly and satisfactorily adjusted at the time.

THIRD. There is no evidence that the plaintiff has applied to the proper department for his pay and been refused.

If this is a case arising upon a contract, express or implied, as it must be in order for the plaintiff to recover, there is no evidence that the proper department is unwilling or has refused to pay the amount due. If the plaintiff has a legal right to what he claims, then he can receive what is due by applying to the proper officer in the War Department and making due proof of the facts entitling him to receive. There can be no necessity of coming to this court and then going to Congress until after the proper department has refused payment. The presumption is, that such department will properly understand the law and duly appreciate the facts and promptly perform its duty. It is incumbent upon the plaintiff to show that the government has failed to perform its duty. He shows no cause of action in this court until he proves demand and refusal, because the condition is implied in all such cases, and it attaches to the claim, that the party has no right to it until he has demanded it of the proper officer and submitted his proof to show that he is entitled.

His claim is due only upon proper demand. When that is made upon suitable evidence of right to receive, then, and then only, can the party come into this court and demand its agency in determining his rights. Before these steps have been taken the United States are not shown to have been in default, and before they are so they cannot be properly sued.

FOURTH. The United States are not responsible for the loss of plaintiff's horse after his return home.

The record does not show of what disease or when the horse died. He may have been diseased before he left home, or have become so by plaintiff's own negligence after his return. The United States were not guarantors that the plaintiff's horse would not sicken and die, nor that he was equal to the service in which he was employed.

There is no evidence that the plaintiff objected at the time to the character or extent of the service, or to the quality or quantity of food supplied, nor of the general usage of his team. If the whole business went on without complaint or remonstrance at the time, it would be unjust now to call upon the government to make up a loss which resulted from what the owner of the team did not object to when the service was being rendered.

It is not shown that the death of the horse was occasioned by undue service required or improper or insufficient forage supplied. The witness merely gives an opinion, but does not state a fact upon which to found it. He does not state how heavy a load he was required to

take, nor how fast or far he was compelled to drive in a day, nor the quantity or quality of the food furnished. Mere opinions do not prove facts.

FIFTH. This is a stale demand which has slept nearly forty-six years, and therefore the presumptions are against its validity, and it ought to be rejected.

The transaction upon which this claim rests occurred early in the year 1813, and the record shows no steps taken since to collect any thing in consequence of it. About forty-six years have elapsed since the claim, if any exists, arose. The ordinary statutes of limitation have run some seven or eight times over, and not a word has been heard of the claim, as far as the record shows. If it had a valid foundation, the proper department could and would have paid it. The plaintiff has delayed until it is probable that all the officers who then served on the northern frontier are dead, and then he first applies for compensation.

The United States has not now the means of developing the whole of the facts. The Treasury Department, where a large portion of the records relating to these transactions were kept, has been twice burned since; and if the records once showed all the facts, it is not probable that a trace of them can now be found. Under these circumstances, the lapse of time raises a strong presumption against the claim, and, unaccounted for, should operate as a bar. It should be rejected, if upon no other ground, upon that of mere staleness and the presumption arising therefrom.

See solicitor's brief in Aubrey's case.

For these reasons this claim ought to be rejected.

R. H. GILLET,
Solicitor.

MARCH 18, 1857.

IN THE COURT OF CLAIMS.

JUNE 6, 1859.

RICHARD STEENBURG *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner states that, on or about the 2d day of March, A. D. 1813, the United States pressed into their service two span of horses, sleighs, and harness, of his, with himself and driver, and employed them in transporting troops and military stores from Alburg, Vermont, to Plattsburg, New York, and from Plattsburg to Sackett's Harbor, and detained them thirty-two days, and so used them that one of the horses died. He claims \$120 for the horse that died, and \$3 a day for each span of horses and their drivers, for thirty-two days,

amounting in the whole to \$312, with interest. He credits six dollars received.

George Weekes, a witness on the part of the petitioner, testifies as follows :

"I knew the claimant before the war of A. D. 1812, with Great Britain, at Alburg, in the State of Vermont. In the forepart of the month of March, 1813, I was residing in Champlain, in the State of New York, nearly opposite to where claimant lived, Lake Champlain dividing us. On or about the eighth day of March, 1813, a United States officer and eight men, soldiers of the regular army, came to my house, in Champlain, accompanied by Wm. Hicks, a custom-house officer, who pointed out to the United States officer where persons owning teams resided. The said officer then said to me, 'your team I want and shall take; if you do not drive it I will furnish a driver.' I then got up my horses and sled, the officers and men got in, and the officer ordered me to drive across the lake to Alburg; I obeyed, and drove to claimant's house; the United States officer then proceeded to press into the United States service other teams; he pressed claimant's two span of horses and sleighs; the claimant drove one span and Moses J. Jenner drove the other span. They were then ordered to drive to Champlain village, and they did so; from there they were ordered to Plattsburg, where they remained several days awaiting orders. General Pike's command was at Plattsburg; the teams in question were loaded with the United States soldiers, portions of the United States sixth infantry, called the 'saucy sixth.' From Plattsburg they proceeded with their loads to Sackett's Harbor. The teams were used very harshly, and badly fed; the roads were bad, and many horses gave out; they were compelled to go as long as they could stand to go; the teams were unequally loaded; I saw that one of the claimant's teams was heavily loaded, and one of his horses gave out in returning; I administered medicine to him, but he continued to fail; the sickness of the horse was occasioned, in my judgment, by overloading and shortness of fodder in going, and pressing them beyond their strength. The United States paid three dollars per day, and found the teams; I heard that the horse of claimant died after he got home from the effects of the journey; claimant was the owner of the teams, and each team was employed thirty-two days."

The witness valued the horse that died at one hundred and twenty-five dollars. He further said: "The name of the officer who pressed the teams I have forgotten; they all wore the United States uniform; at Plattsburg, we were all under the command of General Pike, a United States officer."

William Aubrey, also a witness on the part of the petitioner, testified as follows :

"In March, A. D. 1813, I was living a near neighbor to the claimant, in Alburg, Vermont. On or about the 8th of March, 1813, a United States officer, with eight soldiers, came to Alburg, and pressed the teams of claimant and deponent's teams, and ordered them to drive to Champlain, and from Champlain to Plattsburg, which orders they obeyed. Claimant went with and drove one span of his horses, and hired Moses J. Jenner to drive the other span. On their

arrival at Plattsburg they were placed under the military orders of General Pike. When General Pike's army moved a portion of his command was ordered into claimant's and deponent's sleighs, and proceeded to Sackett's Harbor. They were discharged at Watertown. The United States paid me for thirty-two days, at three dollars per day and found. They did not pay all the teamsters then, for want of money. Claimant was paid only six dollars for his two teams, and he performed the same service that I did, and for the same length of time—thirty-two days. I lost one of my horses by hard usage, and one of the claimant's horses died after reaching here from hard usage in overloading and pushing them beyond their strength, and the United States failing to furnish the necessary provender on the road."

"The service was involuntary. I have before stated by whom and what agents the service was procured to be rendered; their names were never made known to me.

"I value the horse lost in this service, belonging to this claimant, one hundred and twenty-five dollars."

This is all the evidence in this case.

The petitioner was a witness in the case of William Aubrey *vs.* The United States. He testified in that case that the *per diem* allowance for the use of team, sleigh, and driver, was three dollars; and now in his petition states that he received six dollars. If his claim was ever well founded, after the payment of six dollars, the United States remained indebted to him ninety dollars, for the use of his team, sleigh, and driver. The witness, William Aubrey, testifies that he received ninety-six dollars for services of precisely the same kind as those rendered by the petitioner, but that the petitioner received only six dollars; all the teamsters, he said, were not then paid for want of money. According to this evidence, the petitioner's claim would have been paid if there had been money in the hands of the paying officer, and this was known to the petitioner. As regards, then, the claim for the use of his team, sleigh and driver, the case made by the evidence is, that the petitioner had a just and undisputed demand against the United States for services of precisely the same kind as those for which his neighbors and acquaintances actually received compensation at a fixed rate, and on account of which he had actually received six dollars, and would have received the full amount due him if there had been money to pay him; and that with such a claim and with full knowledge of its character and acknowledged justice he remained quiet, taking no steps to obtain it, and making no demand on any department of the government therefor for more than 42 years. Such conduct, at best, is gross neglect, and not ordinarily pursued in cases of just claims. Hence it raises a very strong presumption against the original justice of this claim. But this claim depends entirely on oral testimony and is of such a character that, after so great a lapse of time, even if it were originally well founded, it may justly be presumed to have been satisfied. The petitioner has offered no evidence, nor even made an averment in his petition, to explain his delay, or to rebut the presumption raised against his claim by the lapse of time.

The petitioner's claim for the value of the horse that died is still more remarkable. To require the United States, after the lapse of

more than forty-two years, to contest with the petitioner the question, whether whilst the horse was in their service there was such negligence on their part in its treatment as that thereby its death was occasioned, is plainly unjust and unreasonable. But the evidence, even if it be received as true, does not satisfy our minds that the death of the horse was occasioned by such neglect on the part of the United States as rendered them liable to the petitioner in damages.

Our opinion is that the petitioner is not entitled to relief.

JAMES VALENTINE.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JAMES VALENTINE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's original evidence, transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said court, at Washington, this fifth day of December,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

To the honorable Judges of the Court of Claims of the United States:

The petition of James Valentine, assignee of Oliver Wiley, of Chazy, in the county of Clinton, in the State of New York, begs leave respectfully to represent unto this honorable court that he is interested in, and is the owner of, a claim which he has against the United States, arising from the consideration that on or about the first day of March, A. D. 1813, the United States pressed into its service his hired man, and one span of horses, sleigh, and harness, and employed them in transporting troops and military stores from Alburgh, Vermont, to

Plattsburgh, and from Plattsburgh to Sackett's Harbor, and detained them sixty days, and so used them that said horses died.

And for this service and loss your petitioner claims that he is justly entitled to be paid \$200, the value of said horses, and one sleigh and harness destroyed valued at \$25 each, and for sixty days' use of team and driver at \$3 per day, making in the aggregate four hundred and thirty dollars, exclusive of interest. This claim was presented to Congress in 1854, but what action has been had thereon he is not informed.

And therefore prays this honorable court will examine and hear said claim and such proof as he may have to offer in support thereof; and that they report a bill to Congress for the payment of said claim, with the interest from the time of said loss and service.

And your petitioner, as in duty bound, will ever pray.

Dated Chazy, August 9, 1855.

JAMES VALENTINE.

Witnesses: STEPHEN ^{His} + WILEY.
mark.

JOSEPH ^{His} + GONYETTE.
mark.

STATE OF NEW YORK, *County of Clinton, ss:*

Oliver Wiley, of Chazy, in the county of Clinton, in the State of New York, being duly sworn, doth depose and say that the petition above by him subscribed contains the truth according to the best of his information and belief.

JAMES VALENTINE.

Sworn to and subscribed before me this ninth day of August, A. D. 1855.

ANTHONY TROMBLY,
Justice of the Peace.

IN THE COURT OF CLAIMS.

OLIVER WILEY *vs.* THE UNITED STATES.

Schedule of Claimant's evidence.

1. The deposition of George Weekes, as taken and returned by the United States commissioner of the Court of Claims for the county of Clinton, New York.
2. The deposition of Richard Steanburgh, as taken and returned by the same commissioner.
3. The petition and evidence filed with the clerk containing the application to Congress for relief.
4. Oath of claimant and assignment of claim to his son Albert Wiley, and assignment from Albert Wiley to his brother-in-law James Valentine, on which a motion will be made to revive the suit in the name of the assignee, James Valentine.

SIR: Please take notice that the testimony on the part of the claimant is closed, and the original testimony so taken and closed, together with the assignments, are on file with the clerk of this court.

Dated January 18, 1858.

Yours, &c.,

C. K. AVERILL,
Attorney for Claimant.

DANIEL RATCLIFF, Esq.,
Assistant Solicitor United States Court of Claims.

STATE OF NEW YORK, *County of Clinton, ss.*

On this 25th day of November, A. D. 1858, personally came George Weeks and Richard Steanburgh, the witnesses within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner, and then proposed by him to the witnesses; and the answers thereto were written down by the commissioner in the presence of the witnesses, who then subscribed the depositions in the presence of the commissioner. The depositions of George Weeks and Richard Steanburgh, taken at the request of Calvin Wiley, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Oliver Wiley. The adverse party was notified, did not attend, and did not object, but reserved the right to cross-interrogatories on the coming in of the answers.

H. G. ROBBINS,
Com'r U. S. Court of Claims.

COURT OF CLAIMS.

OLIVER WILEY, claimant, *vs.* THE UNITED STATES.

Interrogatories and cross-interrogatories to be administered to Richard Steanburgh, a witness offered on the part of the claimant in the above entitled action, and answers to be written down and taken by the United States commissioner of the court appointed for the county of Clinton, in the State of New York, to be used on the trial of this action, to wit:

Direct examination.

1st. Do you know the parties, or either of them, in the above entitled action?

2d. Do you know the claimant ever performed any and what service for the United States in the war of 1812 with Great Britain; if you do, state the time, place, and circumstances fully as you know?

3d. In what manner did he enter the service, and by whom and what agents employed, and whether the service was voluntary or involuntary, and where did his team go to, how long detained, and

what injury befell his team, sleigh, and harness, and by whose fault, and what was the value of the horses, sleigh, and harness.

4th. Who drove the team, and whose team was it, and where is the person who drove the team, and was claimant paid?

5th. What is your age and occupation, and where your place of residence the last year?

6th. What relation are you to the claimant, and have you any interest in the present claim?

Lastly, if you know any other matter or thing to which you have not been interrogated, state it fully as far as you know.

The same interrogatories to be administered to Stephen Wiley and James Wiley, witnesses for the claimant.

C. K. AVERILL,
Attorney for Claimant.

COURT OF CLAIMS.

OLIVER WILEY, claimant, *vs.* THE UNITED STATES.

Interrogatories and cross-interrogatories to be administered to George Weeks, a witness offered on the part of the claimant in the above entitled action, and answers to be written down and taken by the United States commissioner of this court appointed for the county of Clinton, in the State of New York, to be used on the trial of this action, to wit:

Direct Examination.

1st. Do you know the parties, or either of them, entitled in this action?

2d. Do you know the claimant ever performed any and what service for the United States in the war of 1812, declared by the United States against Great Britain; if you know, state the time, place, duration, and nature of the service, and whether it was voluntary or involuntary, and in what manner he entered the service, and what with?

3d. Whose team was it, and who drove it for the claimant, and where is that person now?

4th. If you know, state what injury occurred to the team, sleigh, and harness while in said service?

5th. What was the value of said team, sleigh, and harness, separately, and the value per diem for the team?

Lastly, do you know any other matter or thing to which you have not been interrogated; state it fully; and whether you are in any way related to the claimant, or have any interest in said claim.

C. K. AVERILL,
Attorney for Claimant.

Cross-examination.

No questions at present.

D. RATCLIFFE,
Assistant Solicitor Court of Claims.

IN THE COURT OF CLAIMS.

OLIVER WILEY, claimant, *vs.* THE UNITED STATES.

Deposition of George Weeks, a witness, produced, sworn, and examined on oath, on the twenty-fifth day of November, A. D. 1858, at my office in Champlain, in the county of Clinton, and State of New York, by virtue of the annexed papers.

George Weeks, of Rouse's point, in the county of Clinton and State of New York, aged sixty-seven years, a witness, produced, sworn, and examined on the part and behalf of the claimant, Oliver Wiley, deposeth and saith as follows :

Imprimis. To the first interrogatory, the said George Weeks says : That he knows the parties.

To the second interrogatory, he answers and says : That he is sixty-seven years of age, and a farmer, and has resided at Rouse's point during the past year and for a great number of years ; that on or about the 8th day of March, A. D. 1813, he was residing at Champlain, Clinton county, New York, when a United States officer—a lieutenant—and eight United States soldiers, whose names he does not know, came to his house at Rouse's point, and pressed his team, and the officer and men got into his sleigh ; he was ordered to drive them to Alburgh, in the county of Grand Isle, in the State of Vermont, which order he obeyed, and drove them to Alburgh, where the said officer set about pressing other teams, and pressed the span of horses, sleigh, and harness belonging to this claimant, into the United States service, and was ordered to Plattsburgh, and went there, and was taken into the American camp, commanded by General Pike ; that as soon as the said army was ready to move, a squad of soldiers, with implements of war, entered the sleigh of claimant, and the army moved westward, in sleighs pressed chiefly for the purpose of moving General Pike's command to Sackett's Harbor ; General Pike was present, and directed the movements of the army ; that the claimant's team delivered its load at Sackett's Harbor, and was gone thirty days to his knowledge, and how much longer he does not know, as his team gave out and lagged behind.

To the third interrogatory, he answers : The span of horses, sleigh, and harness belonged to claimant, but claimant did not go with the team, but hired one Thomas Clark, who went with it, and drove it to Sackett's Harbor ; Clark is now dead.

To the fourth interrogatory, he answers : That he was in company with claimant's team all the way from Plattsburgh to Sackett's harbor ; the sleighing was poor, some of the time bare ground ; some of the teams were loaded heavier than others ; claimant's team was heavily loaded, and obliged to keep up with those that were lighter loaded ; they were not suffered to lag behind, and were urged forward, whether able to go or not ; I noticed that claimant's team was urged beyond its strength, not by the driver, but those in the sleigh and the officers in command ; when they got to Sackett's Harbor, claimant's harness was all drawn to pieces, and his sleigh broken,

and horses jaded out; in returning, the horses gave out at Canton, and were unable to draw the broken, empty sleigh; the driver was obliged to lead the horses home.

To the fifth interrogatory, he answers: As horses were going, the span was worth two hundred dollars, the sleigh twenty-five dollars, and the harness twenty-five dollars; the per diem allowance by the United States for a span of horses was three dollars per day and team found by the United States, and four dollars per day when the owner found fodder.

To the last interrogatory, he answers: That he has no interest in this claim, nor is he related to the claimant; that there is no other matter that he now recollects that could be of any benefit to either party.

GEORGE WEEKS.

Subscribed and sworn to before me this 25th day of November, 1858.

H. G. ROBBINS,

Commissioner of United States Court of Claims.

IN THE COURT OF CLAIMS.

OLIVER WILEY, claimant, *vs.* THE UNITED STATES.

Deposition of Richard Steanburgh, a witness produced, sworn, and examined on oath, on the twenty-fifth day of November, A. D., 1858, at my office in Champlain, in the county of Clinton, and State of New York, by virtue of the annexed papers.

Richard Steanburgh, of Duane, in the county of Franklin, in the State of New York, aged seventy-one years, a witness produced, sworn, and examined on the part and behalf of the claimant, Oliver Wiley, deposeth and saith as follows:

Imprimis. To the first interrogatory this deponent saith: I know the parties.

To the second interrogatory he answers and says: That the claimant, in the fore part of March, 1813, was residing in Alburgh, Vermont, and a neighbor to this deponent, and was the owner of a span of horses, sleigh, and harness; that on or about the 8th day of March, 1813, a United States press-gang came to Alburgh, headed by an officer of the United States army, and pressed the above team, and pressed deponent's team; that they were ordered to Plattsburgh as the place of rendezvous, where the main body of the United States army lay, under the command of General Pike, and awaited further orders; that after a detention there of nine days the whole army of General Pike moved west, in the sleighs pressed for the purpose, claimant's team aforesaid being one of them. The teams delivered their loads at Sackett's Harbor, upwards of two hundred miles from where the claimant's team was pressed. Claimant's team was absent in said service sixty days.

To the third interrogatory he answers and says: That the manner of entering the service and duration of service has been stated in his

answer to the second interrogatory; the service was involuntary; the claimant was obliged to hire a person to drive his team by the name of Clark, who went with the team to Sackett's Harbor; the horses gave out in returning, at Canton; the cause of their giving out was the heavy loading them by the United States agents, and crowding them forward over bad roads and scarcity of fodder. When I saw them at Canton, the horses were entirely jaded out, and could not draw the sleigh. Clark was obliged to leave the sleigh and harness, both of which were broken to pieces and valueless, and led the horses home. It was sixty days before he got home with them, and they both died soon after from the hard usage aforesaid. The fault was in the United States agents loading them so heavily, and compelling them to proceed and keep up with the army. The horses were worth two hundred dollars, the sleigh and harness fifty dollars.

To the fourth interrogatory he answers: Clark drove the team for claimant, and the team was claimant's. Clark is now dead. I know the claimant nor Clark was not paid.

To the fifth interrogatory he answers and says: That he is seventy-one years old, and by occupation a farmer. The last two months I have been a resident of Duane, Franklin county, New York; a year previous I was a resident of Stockholm, St. Lawrence county, New York.

To the sixth interrogatory he says: Claimant married my sister, and he has no interest in the present claim.

To the last interrogatory he answers: That he knows of no other matter or thing material to this case, except it be that the claimant has recently died.

RICHARD ^{his} + STEANBURGH.
mark

Sworn and subscribed before me, November 25, 1858.

H. G. ROBBINS,
Commissioner of United States Court Claims.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The petition of Oliver Wiley, of Chazy, in the county of Clinton and State of New York, humbly sheweth unto your honorable body that in the year 1812, he was a resident citizen of Alburgh, county of Grand Isle, in the State of Vermont; that the same year he was drafted in the militia of the last mentioned State, and while serving out his term at Alburgh, aforesaid, to wit: on or about the first day of January, 1813, his two-horse team, sleigh, and harness were pressed by the United States troops under command of General Pike, into the service of the United States; that a detachment of United States troops were then stationed at Alburgh, aforesaid, and when ordered to join the main army under General Pike, at Plattsburgh, his team as aforesaid was pressed, and your petitioner was obliged to

furnish a man to go with his said team and take charge and care of it, and be subject to the orders of the United States. That said team left Alburgh with the detachment aforesaid, loaded with men and baggage, on the day before mentioned, and on arriving at camp in Plattsburgh, was further detained there until the army, under the command of the general officer aforesaid, was ready to move for the place of their destination at Sackett's harbor. That one Thomas Clark, of Alburgh, aforesaid, a trusty man, (who is now dead,) was employed by your petitioner to go with said team, and who went with them to Sackett's harbor, carrying United States troops and baggage; that from the time the said team left Alburgh until they returned from Sackett's harbor, was two months, or sixty days, during all which time they were in the service of the United States, and for which service he was never paid. And your petitioner further represents that when said horses returned they were entirely used up and died immediately, and the harness broken in pieces, the sleigh broken and tied up with withs, and both sleigh and harness valueless. That said horses were worth, when they were pressed into said service, the sum of two hundred dollars, the harness \$25, and the sleigh \$25; that the use of said team, with the teamster, was worth two dollars per day and found by the United States; and for which loss your petitioner has never been paid.

Your petitioner therefore prays that your honorable body will pass a law providing for the payment of the said property and for the use of the same, with reasonable interest from the time of their return as aforesaid.

And your petitioner, as in duty bound, will ever pray.

OLIVER ^{his} + WILEY.
mark.

Witness: C. K. AVERILL.

CHAZY, *February* 28, 1854.

STATE OF NEW YORK, *County of Clinton*, ss:

Oliver Wiley, the above-named petitioner, being duly sworn, doth depose and say that he has heard read the above petition by him subscribed, and that the matter and facts therein stated are true according to the best of his knowledge, information, and belief, and that in respect to the matter stated on information he believes it to be true. And further deponent saith not.

OLIVER ^{his} + WILEY.
mark.

Sworn and subscribed before me this twenty-eighth day of February, 1854.

ANTHONY TROMBLY,
Justice of the Peace.

THE UNITED STATES TO OLIVER WILEY,

Dr.

1813—To span of valuable horses pressed, and died from hard service.....	\$200 00
To sleigh, broken in pieces from hard service.....	25 00
To harness, broken in pieces from hard service.....	25 00
To sixty days' use of team, at \$2 per day.....	120 00
	370 00
To interest from 1813, at 6 per cent.....	910 00
	1,280 00

STATE OF NEW YORK, *County of Clinton*, ss:

Stephen Wiley and James Wiley, of Chazy and Champlain, in said county, being duly sworn, doth depose and say they have each read the foregoing petition of Oliver Wiley, and know the contents thereof. And deponents further say that they are knowing to the facts in relation to the pressing of the team aforesaid, at the time it occurred, into the service of the United States, and it was absent, under said impressment, sixty days; that soon after, and almost immediately on the return of said horses, they died; and it evidently appeared that they had been used up by hard service. That they valued the said horses at two hundred dollars, and the sleigh and harness was worth when pressed, each, the sum of twenty-five dollars, and when returned were useless. And deponents further say that the use of said team and the man furnished to drive them, were worth \$2 per day and found. And further they say not.

STEPHEN ^{his} + WILEY.
mark.JAMES ^{his} + WILEY.
mark.

Sworn and subscribed before me February 28, 1854.

ANTHONY TROMBLY,
Justice of the Peace.

I certify that I am well acquainted with Stephen and James Wiley, who appeared before me on the day within mentioned and subscribed to the within affidavit, and they are persons of credibility.

ANTHONY TROMBLY,
Justice of the Peace.

I, Oliver Wiley, of the town of Chazy, county of Clinton, State of New York, do hereby sell, assign, grant, and convey all my right, title, and interest in certain claims that I hold against the United States government, to my son, Albert Wiley, in money and

land, or whatever I may draw from the United States in my lifetime or after my death.

Dated at Chazy this 23d day of March, 1855.

^{his}
OLIVER + WILEY.

^{mark.}
^{her}
MARY + WILEY.
^{mark.}

In presence of—

ANTHONY TROMBLY.

^{his}
JOSEPH + GOAYETT.
^{mark.}

STATE OF NEW YORK, *Clinton county*, ss :

On this 21st day of December, 1858, before me personally came Anthony Trombly, a subscribing witness to the above instrument, to me known, and he being by me duly sworn, did depose and say that he resided in the town of Chazy, in said county; that he knew Oliver Wiley and Mary Wiley, the individuals described in and who executed the said instrument; that he was present and saw the said Oliver Wiley and Mary Wiley execute the same; that the said Oliver Wiley and Mary Wiley acknowledged to him the execution thereof; and that thereupon he, the said Anthony Trombly, became the subscribing witness thereto.

B. W. MERRITT, *Justice of the Peace*.

STATE OF NEW YORK, }
Clerk's office of Clinton county, } ss :

I, Frederick W. Ames, clerk of the county courts of said county, (the same being courts of record,) do hereby certify that B. W. Merritt, whose name is subscribed to the certificate of the proof of acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a justice of the peace in and for said county of Clinton, dwelling therein, commissioned, sworn, and duly authorized to take the same; and further, that I am well acquainted with the handwriting of said justice of the peace, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine, and that the said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my name and affixed the
[L. s.] seal of said court and county this 27th day of December,
A. D. 1858.

F. W. AMES, *Clerk*.

Per JOHN CROWLEN, *Deputy*.

On the 30th day of November, in the year of our Lord one thousand eight hundred and fifty-eight, before the undersigned witness, residing in the town of Champlain, in the county of Clinton, in the State of New York, personally appeared and was present Mr. Albert

Wiley, of the said town of Champlain, farmer, who, being present as aforesaid, did and doth acknowledge and confess that for and in consideration of the price or sum of one hundred dollars, lawful money of the United States, to him, the said Albert Wiley, in hand paid by Mr. James Valentine, of Champlain aforesaid, at and before the ensealing and delivery of these presents; he, the said Albert Wiley, hereby acknowledging the receipt of the said sum of one hundred dollars, hath, and by these presents doth, grant, bargain, transfer, alienate, sell, and assign all the right, title, interest, property, claim, or demand of any kind whatsoever, which he, the said Albert Wiley, his heirs or legal representatives, have, or have in any way or manner a right to claim from the government of the United States for and on account of any services which the late Oliver Wiley, in his lifetime, of the town of Chazy, deceased, did for the government of the said United States, or for any losses which he, the said Oliver Wiley, may have sustained during the war between the said United States and Great Britain, usually called the war of 1812, hereby yielding unto the said James Valentine, his heirs and assigns, all and singular the rights and claims of him, the said Albert Wiley, his heirs and assigns, which he or they could of right claim from the said United States for and on account of any claim which he, the said late Oliver Wiley, father of the said Albert Wiley, may at any time have had against the said United States.

Done and passed the day, month, and year first above written.

In faith and testimony whereof, the said Albert Wiley hath to these presents, first duly read, set, and subscribed his seal and signature, in presence of John Hungerford witnessing the execution hereof.

ALBERT WILEY. [L. s.]

J. HUNGERFORD.

STATE OF NEW YORK, *County of Clinton*, ss:

On this 30th day of November, 1858, before me personally came Albert Wiley, to me known to be the individual described in and who executed the foregoing assessment, and acknowledged that he executed the same.

JOHN RULLIS, *Justice of the Peace*.

STATE OF NEW YORK, }
Clerk's office of Clinton County, } ss:

I, Frederick W. Ames, clerk of the county courts of said county, (the same being courts of record,) do hereby certify that John Bullis, whose name is subscribed to the certificate of the proof of acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a justice of the peace in and for said county of Clinton, dwelling therein, commissioned, sworn, and duly authorized to take the same; and further, that I am well acquainted with the handwriting of said justice of the peace, and verily believe that the signature to the said certificate of proof or

acknowledgment is genuine, and that the said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my name and affixed the [L. s.] seal of said court and county, this 29th day of December, A. D. 1858.

F. W. AMES, *Clerk.*

Per JOHN CROWLEN, *Deputy.*

IN THE COURT OF CLAIMS.

No. 324.

JAMES VALENTINE, Assignee, etc., *vs.* THE UNITED STATES.

CLAIMANT'S POINTS AND BRIEF.

Statement.

General Pike, the agent of the United States, in command of the United States army on the northern frontier at Plattsburgh, in the war of 1812 sent out United States soldiers with an officer from his command to impress teams for transporting his army to Sackett's Harbor, and, among others, impressed the team of Oliver Wiley, a citizen of the United States. The team was used in such a way that the horses died, and damaged the harness and sleigh, and left the services unpaid.

The United States are liable for the injury to the team, &c.

They are also liable for the use of the team and for the amount of the ascertained aggregate value, \$430 and interest, which is stated in detail in the testimony of George Weeks. (See his answer to 5th interrogatory at page 7 of the Record.)

The grounds of liability on the part of the United States are :

I. The impressment was the act of the authorized agent of the United States, who was carrying on a war with great Britain ; and in support of the fact of agency, reference is here made to 2d volume "American Military and Naval Heroes," p. 23, from which the following is extracted :

"Immediately after the declaration of war, Pike was stationed with his regiment upon the northern frontier, and, upon the commencement of the campaign of 1813, was appointed a brigadier general ;" and, at page 24, as follows :

"He was selected for the command of the land forces in an expedition against York, the capital of Upper Canada, and on the 25th of April sailed from Sackett's Harbor."

American State Papers, Claims, p. 874, "Philip B. Robert's charge of building barracks for General Pike's troops, at Plattsburgh, December, 1812," &c.

"It follows that the nation is liable for the acts of such agents as it sees fit to employ in the prosecution of its object." Per Gilchrist,

C. J., in the case of the owners of the brig *Armstrong vs. the United States*. (See Devereux's Reports, page 172.)

II. It being the act of the United States, the fifth article of the amended constitution of the United States secures to the owner just compensation for property taken for public use. (See U. S. Statutes at Large, vol. 1, page 21.)

The just compensation meant is to make whole; and this cannot be done without applying the same remedy against the United States that the claimant could legally exact in an action of trover from an individual who converts the property of another, with interest from the time of conversion.

It was the duty of the agents to seek him and tender him the pay due from these impressed services and losses. It was never done. The evidence is he was not paid. (See answer to 4th interrogatory from witness Steanburgh, page 9 of the Record.)

III. It is the custom of Congress to provide by special acts for such claims.

See the following cases: Henry Knowles, (impressment of horses,) 24th Cong. 1st sess., Feb. 17, 1836; A. J. King, (impressment of horses,) 26th Cong. 1st sess., July 21, 1840, 6; George Miller, (impressment of horses,) May 8, 1820; Andrew Moore, (impressment of horses,) Feb. 5, 1833; Theophilus Cooksey, (impressment of horses,) 21st Cong. 1st sess., Jan. 30, 1830; David Fielding, (impressment of horses,) 19th Cong. 2d sess., March 2, 1827.

C. K. AVERILL,
Attorney for Claimant.

IN THE COURT OF CLAIMS.

JAMES VALENTINE *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for services rendered and losses sustained by Oliver Wiley, by the impressment of his team at Alburgh, Vermont, in 1813.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. Mr. Valentine claims as assignee of Oliver Wiley, but makes no proof of an assignment from him.

In the record are what purports to be an assignment from Oliver and Mary Wiley to Albert Wiley, and one from the latter to the plaintiff, but the execution of neither is proved so as to be legal evidence.

Second. There is no evidence that the assignment from Oliver and Mary Wiley includes the demand now presented.

That paper assigns the interest of Oliver Wiley "in certain claims that I hold against the United States government, to my son Albert Wiley, in money and land, or whatever I may draw from the United States in my lifetime, or after my death." (Record, p. 12.)

This is not an assignment of the claim in question, because it is not sufficiently described. What the claims were that he held is not described nor proved.

The assignment from Albert Wiley to the plaintiff does not follow the one to him, but is for a different matter, not specified in the one to him.

Third. That Wiley's team was taken into service and went from Alburgh, Vermont, to Plattsburgh and Sackett's Harbor, New York, and that it was driven by a person employed by him by the name of Thomas Clark.

Fourth. That the team was absent at least 30 days, but the exact number is not proved.

Weeks, in his deposition, says that Wiley's team was absent 30 days, and how much longer he did not know. (Record, p. 7.)

Steanburgh, in his evidence, says the team was absent in the service 60 days. (Record, p. 8.)

At page 9 he says it was 60 days before Clark got home with the horses. But this does not show how long they were employed by the impressing officers. *Weeks* got home, he says, in 30 days. *Steanburgh*, in his petition in his case, (No. 318,) swears that he was absent thirty-two days only. And in his deposition in this case (p. 8,) he swears he saw the horses when he was at Canton, (as did *Weeks* p. 7,) which is only a little over a hundred miles west of Alburgh. Of course he saw them on his way home, and which must have been some three or four days before he arrived there. Now, if Wiley's horses were kept away from home for sixty days, then they must have occupied some thirty days more in passing between Canton and Alburgh than *Steanburgh* did with his own team. This part of *Steanburgh's* statement needs confirmation to be credited.

Fifth. Wiley's horses died after they returned home, but there is no sufficient proof of the real cause of their death.

By *Steanburgh's* own statement, Clark kept up with him on his return as far as Canton. The inference is, that up to that time they were neither sick nor broken down. If otherwise, then the driver was in fault in going so fast.

There is no proof showing how far the horses were driven in any given time, none of the amount of load they drew, nor any showing that they scrimped in the quantity of their food, nor that it was of an unsuitable quality. The witnesses give opinions, but do not specify such facts as to enable others to form any conclusions for themselves.

The accounts which they give of the sleigh and horses prove them to have been substantially worthless. Nothing is proved concerning the state and condition of the horses or sleigh and harness before starting. There is no evidence that the driver objected to the size of the load drawn or the speed with which the journey was performed. The inference, therefore, is, that there was no just cause of complaint, as none was made at the time.

Sixth. There is no sufficient evidence that Wiley was not settled with at the time, and fully paid for the services rendered by his team.

Steanburgh, in his evidence, p. 9, says: "I know the claimant nor Clark was not paid." This is an attempt to swear to a negative

which he could not possibly know. He states no circumstances calculated to show that he knew this fact. He could only truly swear that he did not know that either Wiley or his hired man was paid. He could not know that they, in truth, had not been paid; although, as a matter of hearsay, he might suppose neither had been. This statement proves nothing, and can have no effect in settling matters of fact.

Seventh. There is no evidence that this claim was ever presented to the department for allowance, and none that it was presented to Congress prior to 1854—a period of forty-one years after it is claimed to have originated.

LEGAL PROPOSITIONS.

FIRST. There is no evidence that the plaintiff is the owner of the demand in question.

The papers relied upon to show that he acquired the same from Wiley through assignments are not proved so as to be evidence.

The assignment from Oliver Wiley does not include the present claim. It is too uncertain to prove anything, and it contains no words that cover the present case.

SECOND. The law of 1816 (3 U. S. L., 261) does not extend to this case. It only authorized paying such claims as should be presented within two years from its date. But if in force, it would not extend to the use of teams. The act clearly contemplates that such use had been compensated, and it provided for losses other than the use.

There is no law now in existence under which the plaintiff can be paid for the loss of his horses or the destruction of his sleigh and harness. If there is anything really due for services, on showing that fact the War Department can cause him to be paid, without a special law.

THIRD. The presumption is that the use of the team was paid for at the time.

The statement of Steanburgh concerning non-payment, who is pressing a similar claim, is not affirmative and positive, but is merely negative, and proves nothing. He could not know that no payment was made, and he swears to no circumstances calculated to induce that belief.

If the officer in charge had had no money, he still would have settled with Clark, the driver, and would have given him a certificate of the amount due, or an order on a proper quartermaster.

The silence of Wiley for more than forty years strengthens this presumption.

FOURTH. There is no evidence that Wiley, or the plaintiff, has applied to the proper department for such compensation as he might be entitled

to for the use of his team, or the loss of his horses and destruction of his sleigh and harness.

The plaintiff has no right of action until after demand and refusal to pay.

The presumption is, that if he has a legal right, it will be paid on demand. He must apply to the proper department and be refused payment before he can avoid this presumption. If the claim for use of team was a valid one and has not been paid, it may still be payable; and, if so, the proper officer will pay, and there can be no necessity of applying to this court.

FIFTH. The United States are not responsible for the loss of Wiley's horses after their return home.

There is now no law authorizing the payment for horses thus dying.

There is no evidence in the case showing of what disease they died, or when first attacked. They may have been diseased before they left home, or have become so after they left the service, or for a fault of the owner or driver. Notwithstanding the opinion of Steanburgh, there are no facts to show that the horses died by the fault of the United States, or for the fault of any one for whom they are responsible. The death is not traced to overwork, nor to bad fare, nor to any act of the United States. They may have died from the fault of the owner or driver.

The injury to the sleigh and harness is in no way brought home to the officers who impressed the team. Their previous condition is not shown, nor is that of the horses. There are no sufficient facts proved to enable the court to form an opinion as to the occasion of the death of the horses or of the failure of the sleigh and harness.

SIXTH. The petition does not state when nor upon what consideration the plaintiff became the proprietor of this claim, nor whether he is the sole owner, nor the law upon which the claim is founded.

The first section of the law establishing this court expressly provides: "It shall be the duty of the claimant in all cases to set forth a full statement of the claim and of the action thereon in Congress, or by any of the departments, if any such has been had; *specifying also what person or persons are owners therefor, or interested therein, and when and upon what consideration such person or persons became so interested.*"

These provisions have not been complied with, nor has the first rule of this court, which requires the plaintiff to specify the act of Congress, or rule or regulation of a department, upon which he relies.

For these several causes, the plaintiff cannot recover.

R. H. GILLET, *Solicitor.*

MARCH 19, 1859.

IN THE COURT OF CLAIMS.

JUNE 6, 1859.

JAMES VALENTINE, ASSIGNEE, &c., *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petition in this case was originally filed in the name of Oliver Wiley, and was afterwards, by leave of this Court, amended, so as to allow the petitioner, James Valentine, to claim as the assignee of Oliver Wiley. The original petition stated the following case :

That on or about the first day of March, A. D. 1813, the United States pressed into their service the petitioner, Oliver Wiley, his hired man, one span of horses, a sleigh and harness, and employed them in transporting troops and military stores from Alburg, Vermont, to Plattsburg, and from Plattsburg to Sackett's Harbor, and detained them sixty days, and so used them that the horses died. He claimed to be justly entitled to be paid \$200, the value of the horses, and for one sleigh and harness destroyed, \$25 each, and for sixty days' use of teams and driver at \$2 per day, making in the aggregate \$370, with interest. It was further averred that this claim was presented to Congress in 1854, but what action was had thereon the petitioner, Oliver Wiley, was not informed.

By the amendment the petition was made the petition of James Valentine, assignee of Oliver Wiley, and the claim for the use of team and driver was made at the rate of \$3 a day, instead of \$2 a day. The petition was amended in no other respect. The present claimant has nowhere stated "when and upon what consideration" he became interested in the claim. (10 Stat. at L., p. 612, ch. 122, §1.)

George Weeks, a witness on the part of the petitioner, testified as follows :

"That on or about the 8th day of March, A. D. 1813, he was residing at Champlain, Clinton county New York, when a United States officer, a lieutenant, and eight United States soldiers, whose names he does not know, came to his house at Rouse's Point and pressed his team, and the officer and men got into his sleigh ; he was ordered to drive them to Alburg, in the county of Grand Isle, in the State of Vermont, which order he obeyed and drove them to Alburg, where the officer set about pressing other teams, and pressed the span of horses, sleigh, and harness belonging to this claimant into the United States service, and was ordered to Plattsburg, and went there, and was taken into the American camp commanded by General Pike ; that as soon as the said army was ready to move, a squad of soldiers, with implements of war, entered the sleigh of claimant, and the army moved westward in sleighs pressed chiefly for the purpose of moving General Pike's command to Sackett's Harbor. General Pike was present and directed the movements of the army ; that the claimant's team delivered its load at Sackett's Harbor, and was gone thirty days to his knowledge, and how much longer he does not know, as his team gave out and lagged behind.

“The span of horses, sleigh, and harness belonged to the claimant; he, claimant, did not go with the team, but hired one Thomas Clark, who went with it and drove it to Sackett's Harbor. Clark is now dead.

“That he was in company with claimant's team all the way from Plattsburg to Sackett's Harbor; the sleighing was poor, some of the time bare ground. Some of the teams were loaded heavier than others; claimant's team was heavily loaded and obliged to keep up with those that were lighter loaded; they were not suffered to lag behind, and were urged forward whether able to go or not. I noticed that claimant's team was urged beyond its strength, not by the driver, but by those in the sleigh and the officers in command. When they got to Sackett's Harbor claimant's harness was all driven to pieces, and his sleigh broken and horses jaded out. In returning, the horses gave out at Canton, and were unable to draw the broken empty sleigh; the driver was obliged to lead the horses home.

“As horses were going, the span were worth two hundred dollars, the sleigh twenty-five dollars, and the harness twenty-five dollars; the per diem allowance by the United States for a span of horses was three dollars per day and team found by the United States, and four dollars per day when the owner found fodder.”

Richard Steenburgh, also a witness on the part of the petitioner, testified as follows:

“That the claimant, in the forepart of March, 1813, was residing in Alburg, Vermont, and a neighbor to this deponent, and was the owner of a span of horses, sleigh, and harness; that on or about the 8th day of March, 1813, a United States press-gang came to Alburg, headed by an officer of the United States army, and pressed the above team, and pressed deponent's team; that they were ordered to Plattsburg as the place of rendezvous, where the main body of the United States army lay, under the command of General Pike, and awaited further orders; that after a detention there of nine days, the whole army of General Pike moved west in the sleighs pressed for that purpose, claimant's team aforesaid being one of them. The teams delivered their loads at Sackett's Harbor, upwards of two hundred miles from where the claimant's team was pressed. Claimant's team was absent in said service sixty days.

“That the manner of entering the service, and the duration of service, has been stated in his answer to the second interrogatory. The service was involuntary. The claimant was obliged to hire a person to drive his team, by the name of Clark, who went with the team to Sackett's Harbor. The horses gave out, in returning, at Canton. The cause of their giving out was the heavy loading them by the United States agents, and crowding them forward over bad roads, and scarcity of fodder. When I saw them at Canton, the horses were entirely jaded out, and could not draw the sleigh. Clark was obliged to leave the sleigh and harness, both of which were broken to pieces and valueless, and lead the horses home. It was sixty days before he got home with them, and they both died soon after from the hard usage aforesaid. The fault was in the United States agents loading them so heavily and compelling them to proceed and keep up with the army. The horses were worth two hundred dollars; the sleigh and harness fifty dollars.”

4. "Clark drove the team for claimant, and the team was claimant's. Clark is now dead. I know the claimant nor Clark were not paid."

6. "Claimant married my sister, and he has no interest in the present claim."

7. "That he knows of no other matter or thing material to this case, except it be that the claimant has recently died."

The petitioner has filed in this case a paper in writing, of which the following is a copy:

"I, Oliver Wiley, of the town of Chazy, county of Clinton, State of New York, do hereby sell, assign, grant, and convey, all my right, title, and interest in certain claims that I hold against the United States government to my son, Albert Wiley, in money and land, or whatever I may draw from the United States in my lifetime or after my death. Dated at Chazy this 23d day of March, 1855.

his
" OLIVER + WILEY,
mark.

her
" MARY + WILEY.
mark.

"In presence of—

" ANTHONY TROMBLY.

his
" JOSEPH + GOAYETT."
mark.

The petitioner has also filed in this case another paper in writing, purporting to be an assignment from Albert Wiley to the petitioner.

This is all the evidence in this case.

1. As to the two papers above mentioned, whether they are so authenticated as to be properly admissible as evidence in this case, or, if so admissible, what was their legal operation and effect, it is not material for us now to consider.

2. As to the claim for the use of the horses, sleigh, and driver, this case is similar to the case of *Richard Steenburg vs. The United States*, and the same presumption arises from the lapse of time against the original justice of the claim in this case as in that; and, if it were originally just, there is the same ground in this case as in that for the presumption that it has been satisfied. We refer to our opinion in that case for the reasons on which this opinion is founded.

3. As to the claim for the value of the horses that died, the lapse of time renders it impracticable to enter into an investigation with any just ground to hope for a satisfactory result. For the reason assigned by us in the cases of *Aubery vs. The United States*, and *Steenburg vs. the United States*, we consider it unreasonable and unjust at this late period for the United States to be called upon to meet any such demand. But the evidence, even if it be taken to be entirely true, does not satisfy us that the horses died by reason of any such negligence or improper treatment on the part of the United States as would render them liable for their value.

We are of the opinion that the petitioner is not entitled to relief.

WILLIAM AUBERY.

FEBRUARY 11, 1860.—Reported from the Court of Claims, committed to a Committee of the Whole House, and ordered to be printed.

* The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

WILLIAM AUBERY *vs.* THE UNITED STATES.

1. The petition of claimant.
2. Claimant's original evidence transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. s.] seal of said court, at Washington, this 5th day of December, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

To the honorable judges of the Court of Claims of the United States:

The petition of William Aubery, of Dundee, in the county of Beauharnois, in Canada East, begs leave respectfully to represent unto this honorable court that he is interested in, and is the owner of, a claim which he has against the United States, arising from the consideration that on or about the 2d day of March, A. D. 1813, the United States

pressed into its service, belonging to him, one span of horses, sleigh, and harness, with himself, and employed them in transporting troops and military stores from Alburg, Vermont, to Plattsburg and to Sackett's Harbor, and detained them thirty-two days, and so used them that one of said horses died; and for this service and loss your petitioner claims that he is justly entitled to be paid \$110, the value of said horse, and the destruction and loss of the sleigh, which he valued at \$25, beside the interest from the time of said loss, and therefore prays this honorable court will examine and hear said claim, and such proof as he may have to offer in support thereof, and that they report a bill to Congress for the payment of said claim. And your petitioner, as in duty bound, will ever pray.

WILLIAM AUBERY.

DUNDEE, *August 7, 1855.*

CANADA EAST, *Beauharnois County, ss:*

William Aubery, of Dundee, in the county of Beauharnois, Canada East, being duly sworn, doth depose and say that the petition above by him subscribed contains the truth, according to the best of his information and belief.

WILLIAM AUBERY.

Sworn and subscribed before me this 7th day of August, A. D. 1855.

CHARLES JOHNSON,
Justice of the Peace.

COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

Interrogatories and cross-interrogatories to be administered to George Weekes, a witness offered on the part of the complainant in the above entitled cause, and answers written down and taken by the United States commissioner of this court appointed for the county of Clinton, in the State of New York, to be used on the trial of this action:

Direct examination.

1st. Do you know the parties, or either of them, entitled in this action?

2d. Do you know that the complainant ever performed any service for the United States? If so, state the time and place and all the circumstances attending the same; whether it was voluntary or not; what sort of team he used; if it was his, and how it was used or abused; what injury befel it in the service, and by whose fault; its value, and the number of days employed, and from where and to where it was forced or taken.

3d. Who were the agents, and for whom were they acting, in the impressment of teams, and for what service?

Lastly. State all and any other matter you may know.

C. H. AVERILL,
Attorney for Claimant.

Cross-examination.

No questions at present. If after the deposition comes in the government thinks it necessary to re-examine the witness, the right to do so is reserved.

D. RATCLIFFE,
Assistant Solicitor of the Court of Claims.

COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

Interrogatories and cross-interrogatories to be administered to Richard Steenburg, a witness offered on the part of the claimant in the above entitled action, and answers to be written down and taken by the United States commissioner of this court appointed for the county of Clinton, in the State of New York, to be used on the trial of this action:

Direct examination.

1st. Do you know the parties, or either of them, entitled in this action?

2d. Do you know that the claimant ever performed any service for the United States? If so, state the time and place and all the circumstances attending the same; whether it was voluntary or otherwise; what team he used; if it was his, and how it was used and abused; what injury befel it in the service, and by whose fault; its value, and the number of days it was engaged in the service; and its value per diem.

3d. In what manner did he enter the service, and by whom or what agents was his team impressed; and for what service, and where did the team go to; and if it sustained any injury, how did it occur; and what amount of damage was it to the owner?

Lastly. If you know any other matter or thing to which you have not been interrogated, state it freely as far as you know.

C. H. AVERILL,
Attorney for Claimant.

Cross-examination.

No questions at present. If after the deposition comes in the gov-

ernment thinks it necessary to re-examine the witness, the right to do so is reserved.

D. RATCLIFFE,
Assistant Solicitor of the Court of Claims.

COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

Depositions of George Weekes and Richard Steenburg, witnesses produced, sworn, and examined on oath, on the 25th day of October, A. D. 1858, at my office, in the town of Champlain, in the county of Clinton and State of New York, by virtue of the annexed *consuits* or stipulations.

George Weekes, of Rouse's Point, in the county of Clinton, in the State of New York, aged sixty-seven years, a witness produced, sworn, and examined on the part and behalf of the claimant, William Aubery, deposeth and saith as follows:

Imprimis to the first interrogatory this deponent saith or answers: I know the parties.

To the second interrogatory he answers: I, in March, 1813, was residing in Champlain, New York, and the complainant was residing in Alburg, Vermont, about four miles distant. A lieutenant, wearing the uniform of a United States officer in the regular army, and eight United States soldiers, wearing the uniform of the United States, on or about the 2d day of March, 1813, came to my house and pressed my team, ordered it brought out, and got into it; then ordered me to drive them to Alburg, Vermont, which I did. On our arrival the said officer proceeded to press teams, and among others pressed the two-horse team, sleigh, and harness belonging to William Aubery, a farmer of Alburg. The owners had the privilege of driving their own teams or sending drivers with them, and where no driver was furnished, the teams were driven by any one the officer put over them. The complainant chose to go with his own team. He was then ordered to drive to Champlain, and from Champlain to Plattsburg, and on their arrival there were placed under military orders. He remained there several days, until the United States army, under General Pike, was ready to move. A portion of the command of General Pike was then loaded into his sleigh, drawn by two good horses, the property of the complainant, and they proceeded to transport them to Sackett's Harbor, where he discharged his load, and on returning to Watertown was allowed to return home. I was in company all the way going and returning, until claimant's horses gave out at Canton, and one of them died. I know the horses were abused for want of sufficient provender, and forced along beyond their strength by overloading, and I have no doubt the horse came to his death by hard service and usage, without any fault of the owner, but from the necessity and emergency to keep up with the movements of the army. I value the horse that died at \$110, and the sleigh, which was broken and left behind, at

\$25. According to my best recollection, he was absent in the United States service thirty-two days, in transporting a portion of the United States army, under the command of General Pike, to Sackett's Harbor.

To the third interrogatory he answers: I have forgotten the name of the officer who pressed the teams, but on their arrival at Plattsburg they were under the orders and command of General Pike, and continued under his orders until dismissed at Watertown.

To the last interrogatory he answers: That he knows of no other matter or thing pertinent to the issue, except that he is sixty-seven years old, is not related to claimant, and has no interest in this claim. Has resided the past year at Rouse's Point.

GEORGE WEEKES.

Subscribed and sworn to before me October 25, 1858.

H. G. ROBBINS,

Commissioner of the United States Court of Claims.

COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

Depositions of George Weeks and Richard Steenburg, witnesses produced, sworn, and examined on oath, on the twenty-fifth day of October, A. D. 1858, at my office in the town of Champlain, in the county of Clinton and State of New York, by virtue of the annexed contracts and stipulations.

Richard Steenburg, of Duane, in the county of Franklin, in the State of New York, aged 71 years, a witness produced, sworn, and examined on the part and behalf of claimant, William Aubery, deposeth and saith as follows:

Imprimis to the first interrogatory he answers: I know the parties.

To the second interrogatory the said Richard Steenburg answers: I, in the month of March, A. D. 1813, was a resident of Alburg, Vermont, and neighbor to the claimant, who was the owner of a span of horses, sleigh, and harness. On or about the 8th of March, 1813, a United States officer and eight soldiers, in the sleigh driven by George Weeks, came to Alburg and proceeded to press teams into the United States service, and among others pressed the two-horse team, sleigh, and harness belonging to the claimant, and two teams belonging to the deponent, and ordered them to be driven to Champlain and from thence to Plattsburg, where they were put under military control and kept there until General Pike ordered the army to move west, when a portion of General Pike's command was ordered into the sleigh drawn by the horses of claimant, and they proceeded to Sackett's Harbor with them, and on returning to Watertown were dismissed and returned home, after being absent in the United States service thirty-two days. I went in company with claimant to Sackett's Harbor and returned home with him, and know that one of his horses died of hard usage in this service, from overloading and pushing the team beyond its strength, with lack of fodder, and exposure standing

out nights; that said horse failed at Canton in returning, where claimant was obliged to leave his sleigh broken and worthless from hard usage. I value the horse lost in this service at one hundred and ten dollars, and the sleigh at twenty-five dollars. The per diem allowance was three dollars per day, and found.

To the last interrogatory he answers: I know of no other matter or thing in this behalf; am not related to the claimant, and have no interest in this claim, and for the last two months have been a resident of Duane, Franklin county, New York, and a year previous thereto was a resident of Stockholm, St. Lawrence county, New York.

his
RICHARD  STEEMBURG.
mark.

Subscribed and sworn to before me October 25, 1858.

H. G. ROBBINS,
Commissioner of the United States Court of Claims.

STATE OF NEW YORK, *County of Clinton, ss:*

On this twenty-fifth day of October, A. D. 1858, personally came George Weeks and Richard Steenburg, the witnesses within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner and then proposed by him to the witnesses; and the answers thereto were written down by the commissioner in the presence of the witnesses, who then subscribed in the presence of the commissioner. The depositions of George Weeks and Richard Steenburg, taken at the request of William Aubery, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of said Aubery. The above party was notified, did not attend, and did not object, but reserved the right to cross-interrogatories on the coming in of the answers.

H. G. ROBBINS,
Commissioner of the United States Court of Claims.

IN THE COURT OF CLAIMS.

No. 319

WILLIAM AUBERY *vs.* THE UNITED STATES.

CLAIMANT'S POINTS AND BRIEF.

Statement.

General Pike, the agent of the United States, in command of the United States army on the northern frontier at Plattsburg, in the

war of 1812 sent out United States soldiers with an officer from his command to impress teams for transporting his army to Sackett's Harbor, and among others impressed the team of claimant, and so used them that one of the horses died, and destroyed the sleigh, and paid only for his services, leaving the injury to his horse and sleigh unpaid.

For this injury the United States are liable, which is stated in detail in the evidence of George Weekes, in his answers to 2d and 3d interrogatories, at pages 5 and 6 of the Record, and Richard Steenburg's evidence and answer to 2d interrogatory, at page 7 of the Record.

The injury proved stands thus :

To value of horse.....	\$110 00
“ “ sleigh.....	25 00
	135 00

The grounds of the liability of the United States are—

I. The impressment was the act of the authorized agent of the United States, who was carrying on a war with Great Britain ; and in support of the fact of agency, reference is made to the 2d volume of “American Military and Naval Heroes,” page 23, from which the following is extracted :

“Immediately after the declaration of war, Pike was stationed with his regiment upon the northern frontier, and, upon the commencement of the campaign of 1813, was appointed a brigadier general.”

At page 24 : “He was selected for the command of the land forces in an expedition against York, the capital of Upper Canada, and on the 25th of April sailed from Sackett's Harbor.”

“Building barracks for General Pike's troops at Plattsburg, December, 1812,” &c. (Am. State Papers, Claims, p. 874.)

“It follows that the nation is liable for the acts of such agents as it sees fit to employ in the prosecution of its object.” Per Gilchrist, P. J., in the case of *The Owners of the brig Armstrong vs. The United States*. (See Devereux's Reports, p. 172.)

II. It being the act of the United States, the fifth article of the amended constitution of the United States secures to the owner just compensation for property taken for public use. (See U. S. Statutes at Large, vol. 1, p. 21.)

The just compensation meant is to make whole ; and this cannot be done without applying the same remedy against the United States that the claimant could legally exact in an action of trover from an individual who converts the property of another, with interest from time of conversion.

III. It is the custom of Congress to provide for such claims. (See the following special acts: Henry Knowles, (impressment,) 24th Cong., 1st sess., Feb. 17, 1836 ; A. J. King, (impressment,) 26th Cong., 1st sess., July 21, 1840, 6 ; Andrew Moore, (impressment,) Feb. 5, 1833 ; Theophilus Cooksey, (impressment,) 21st Cong., 1st

sess., Jan. 30, 1830; David Fielding, (impressment,) 19th Cong., 2d sess., March 2, 1827.)

C. K. AVERILL,
Attorney for Claimant.

IN THE COURT OF CLAIMS.

WILLIAM AUBERY *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for loss of a horse and sleigh impressed into the service of the United States at Alburg, Vermont, in March, 1813.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. An officer of the United States army pressed into the military service of the United States the plaintiff's horses and sleigh to transport troops from Alburg, Vermont, to Plattsburg and Sackett's Harbor, New York, early in March, 1813, and that he was absent 32 days. (*Depositions of Weeks and Steenburg*, Record, pp. 6, 7.)

Second. That one of plaintiff's horses failed at Canton, (in St. Lawrence county, N. Y.,) and he left his sleigh there, which had been broken, and he returned home with his horses without it.

Steenburg testifies "that said horse failed at Canton in returning, where claimant was obliged to leave his sleigh broken and worthless from hard usage." (Record, p. 7.)

Weeks testifies: "I was in company all the way in going and returning, until claimant's horses gave out at Canton, and one of them died." (Record, p. 6.)

Weeks does not state when nor where the horse died, nor does Steenburg, but the inference is that he died after plaintiff reached home.

Third. There is no evidence that the plaintiff objected to the manner or extent of the use of his sleigh and horses, nor to the quantity or quality of the food supplied.

Fourth. There is no evidence of the size or weight of the load which plaintiff's team drew, nor that he was compelled to take an improper load.

Fifth. There is no evidence of what disease the horse died, nor any as to the former condition of the horse, nor any as to the former condition of the sleigh, nor that it was broken by being overloaded or otherwise improperly used, or that it was injured while in actual use; but it is highly probable that the snow was gone, or nearly so, at the time of the return, and the sleighing bad, or entirely gone, and that this fact had much to do with wearing down the teams and wearing out the sleighs in returning, if not in going to Sackett's Harbor.

Sixth. The petition does not, at least clearly, claim that the plaintiff was not paid a per diem for himself and horses, but it is clearly inferrible from that and Steenburg's evidence that he was paid three dollars per day for the time he was absent.

Seventh. There is no evidence that this claim has ever been presented to the proper department for payment, or to Congress for relief.

LEGAL PROPOSITIONS.

FIRST. *There is no existing law under which the plaintiff can be paid for the loss of his horse or the damage to his sleigh.*

The act of 1816 is not in force, nor is there any other which is applicable. This is conceded by the plaintiff in his brief. But he claims (as several others do in similar cases) under the fifth amendment of the Constitution, which reads:

“Nor shall private property be taken for public use without just compensation.”

There are three answers to this:

1. The plaintiff received his compensation at the time, and it is presumed to have been just, as there is no evidence of complaint at the time.

2. The damages now claimed are not for the value of property taken, but for losses which are claimed, but not sufficiently proved, to have resulted from use, which was paid for before the losses occurred, and therefore is not within the provision quoted.

3. This provision in the Constitution cannot be executed without legislation by Congress providing the mode, manner, and means of doing so.

The Constitution simply lays down a most valuable general rule, and imposes a salutary duty upon the legislative branch of the government, requiring it when it provides for taking private property for public use, that it shall also make provision for making just compensation. Taking private property without making such compensation is a tort for which those committing it are personally responsible. If, in the present case, those who impressed plaintiff's team did not make compensation for the use that they received, then they were personally liable for the tort. It is to be presumed that the government supplied them with the necessary funds, which it was their duty to apply to that purpose, and until the contrary is fully proven, it is to be presumed they did so.

If no adequate provision was made to compensate the party when his property had been taken for public use, the duty rests upon the legislative branch to make laws providing the means and regulating the compensation. Without statute laws applicable to the case, neither the executive officers nor the courts can now apply a remedy.

If the Constitution alone furnishes the remedy, then the proper executive officers can apply that remedy, and there is no necessity of applying to this court. If they cannot administer relief without legislation, then, clearly, this court cannot. This court cannot award compensation as wrongfully withheld, when the proper executive officers could not rightfully make such compensation. If the plaintiff is constitutionally entitled to relief, it is at the hands, not of this court, but of the legislature.

The federal Constitution contains many provisions which cannot be

practically applied and rendered effectual without legislation by Congress to put them in operation.

Nearly all the judicial power provided in the Constitution requires legislation to carry it into effect. The provision concerning fugitives from service or labor is of the same class. Such also is the provision guaranteeing each State a republican form of government, and protecting the States against domestic violence. The same is true of many other provisions. Congress, as well as the State legislatures, has enacted laws for the purpose of carrying out and practically applying constitutional provisions. When the Constitution lays down a fundamental provision, it is usually necessary for Congress to enact detailed provisions to render it effective in practice.

This question has been before the Supreme Court in *Groves vs. Slaughter*, (15 Peters, 449,) where a provision of the constitution of the State of Mississippi was under consideration. The provision was this: "The introduction of slaves into this State as merchandise or for sale shall be prohibited from and after the first day of May, 1833." The suit was upon a note for slaves introduced and sold as merchandise in that State after that date. The court held that legislation was required in order to execute the act, and until provision was made declaring the effect and consequence of such introduction, the vender could recover upon notes given upon such sale. The opinion of the court was given by Judge Thompson, of New York. At page 499, he said: "The question arising under the constitution of Mississippi is whether this prohibition, *per se*, interdicts the introduction of slaves as merchandise, or for sale, after a given time, or is only directory to the legislature, and requiring their action in order to bring it into full operation, and render unlawful the introduction of slaves for sale."

It was held: "Admitting the constitution is mandatory upon the legislature, and that they have neglected their duty in not carrying it into execution, it can have no effect on the construction of this article. Legislative provision is indispensable to carry into effect the object of this prohibition."

Large portions of the opinion have a direct bearing upon the present question.

It follows that, for want of legislative action under the provision of the constitution in question, no recovery can be had under it. Admitting, for the purposes of argument, that all the facts set up by the plaintiff are true, and that the Constitution has been violated by impressing the teams, he can have no relief until Congress enacts a law under which compensation can be made for such a tort. The wrong may have been committed, but there is no remedy provided under the Constitution or laws which will enable him to recover in this court. There is no act of Congress, or contract, or regulation of a department, which entitles him to what he demands. The act of 1814 provided a temporary remedy for many cases, and no other of a general character has since been enacted. Consequently, the plaintiff cannot recover. (See *Rogers vs. Bradshaw*, 20 John. R., 735, and *Livingston vs. The Mayor of New York*, 8 Wen., 85, which were cases arising under the constitution of New York.)

SECOND.—*This is a stale claim, and has never been presented to the department, nor pay demanded, and it is presumed to have been paid.*

This question has been so fully discussed in the solicitor's briefs in other cases (Steenburg's and Valentine's) that it is deemed unnecessary to repeat what was said in those cases.

THIRD.—*Interest is not allowable.*

This question has been so fully discussed in numerous cases that it is not deemed proper to renew the discussion.

R. H. GILLET,
Solicitor.

MARCH 22, 1859.

IN THE COURT OF CLAIMS.

JUNE 6, 1859.

WILLIAM AUBERY *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner states that on or about the 2d day of March, A. D. 1813, the United States pressed into their service, belonging to him, one span of horses, sleigh, and harness, with himself, and employed them in transporting troops and military stores from Alburg, Vermont, to Plattsburg and to Sackett's Harbor, and detained them thirty-two days, and so used them that one of the horses died. He claims that he is justly entitled to be paid \$110, the value of the horse, and the destruction and loss of the sleigh, which he valued at \$25, besides interest.

George Weeks, a witness on the part of the petitioner, testifies as follows:

"I, in March, 1813, was residing in Champlain, New York, and the complainant was residing in Alburg, Vermont, about four miles distant. A lieutenant, wearing the uniform of a United States officer in the regular army, and eight United States soldiers, wearing the uniform of the United States, on or about the 2d day of March, 1813, came to my house and pressed my team; ordered it brought out and got into it; then ordered me to drive them to Alburg, Vermont, which I did. On our arrival the said officer proceeded to press teams, and, among others, pressed the two-horse team, sleigh, and harness belonging to William Aubery, a farmer of Alburg. The owners had the privilege of driving their own teams, or sending drivers with them, and where no driver was furnished the teams were driven by any one the officer put over them. The complainant chose to go with his own team. He was then ordered to drive to Champlain, and from Champlain to Plattsburg, and on their arrival there were placed

under military orders. He remained there several days, until the United States army, under General Pike, was ready to move. A portion of the command of General Pike was then loaded into his sleigh, drawn by two good horses, the property of the complainant, and they proceeded to transport them to Sackett's Harbor, where he discharged his load, and, on returning to Watertown, was allowed to return home. I was in company all the way, in going and returning, until claimant's horses gave out at Canton, and one of them died. I know the horses were abused for want of sufficient provender, and forced along beyond their strength by overloading; and I have no doubt the horse came to his death by hard service and usage, without any fault of the owner, but from the necessity and emergency to keep up with the movements of the army. I value the horse that died at one hundred and ten dollars, and the sleigh, which was broken and left behind, at twenty-five dollars. According to my best recollection, he was absent in the United States service thirty-two days in transporting a portion of the United States army, under the command of General Pike, to Sackett's Harbor."

"I have forgotten the name of the officer who pressed the teams, but on their arrival at Plattsburg they were under the orders and command of General Pike, and continued under his orders until dismissed at Watertown."

Richard Steenburg, also a witness on the part of the petitioner, testified as follows:

"I, in the month of March, A. D. 1813, was a resident of Alburg, Vermont, and a neighbor to the claimant, who was the owner of a span of horses, sleigh, and harness. On or about the 8th of March, 1813, two United States officers and eight soldiers, in a sleigh driven by George Weekes, of Champlain, came to Alburg and proceeded to press teams into the United States service, and among others pressed the two-horse team, sleigh, and harness belonging to the claimant, and two teams belonging to deponent, and ordered them to be driven to Champlain, and from thence to Plattsburg, where they were put under military control, and kept there until General Pike ordered the army to move west, when a portion of General Pike's command was ordered into the sleigh drawn by the horses of claimant, and they proceeded to Sackett's Harbor with them, and on returning to Watertown were dismissed, and returned home, after being absent in the United States service thirty-two days. I went in company with claimant to Sackett's Harbor, and returned home in company with him, and know that one of his horses died of hard usage in this service from overloading and pushing the team beyond its strength, with lack of fodder, and exposure standing out nights; that said horse failed at Canton in returning, where claimant was obliged to leave his sleigh, broken and worthless from hard usage. I valued the horse lost in this service at one hundred and ten dollars, and the sleigh at twenty-five dollars. The per diem allowance was three dollars per day and found."

This is all the evidence in this case.

The petition in this case was filed in the year 1855, more than forty-two years after the claim originated, and the depositions were taken

in the year 1858, three years thereafter. After so great a lapse of time, to require the United States to contest a claim like this is unreasonable and unjust. It is of such a character that, even if it were of recent occurrence, there would be much difficulty in determining whether the death of the horse was occasioned by the negligence of the United States ; but after the lapse of nearly half a century no investigation could be made from which a just result could reasonably be expected.

Our opinion is that the petitioner is not entitled to relief.

ISRAEL KETCHAM.

FEBRUARY 11, 1860.—Reported from the Court of Claims, committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ISRAEL KETCHAM *vs.* THE UNITED STATES.

1. The petitions of the claimant and amended petition.
2. Original documentary evidence in the case transmitted to the House of Representatives.
3. Petitioner's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. s.] seal of said court, at Washington, this fifth day of December, A. D. 1859.

SAMUEL HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Court of Claims in session assembled:

The petition of Israel Ketcham, of the city of New York, respectfully states that your petitioner had the misfortune of being engaged, as a sub-contractor, in the erection of fortifications on Dauphin island, at the entrance of Mobile bay, during the years of 1819 and 1820. In the year 1819 your petitioner contracted with Nimrod Farrow, then in the city of New York, to take to Mobile a large number of mechanics and laborers, with provisions and other supplies, tools, implements, and other materials for building said fortifications. Suffice it to say, that all that your petitioner agreed with Farrow to do was done, which the vouchers and documents left with the Clerk of the House of

Representatives, and directed to be handed over to the honorable the Court of Claims, will more particularly show; and happy, indeed, would your petitioner be if he could say the same justice had been meted out to him that he had dealt unto others. In 1824, Farrow acknowledged as being due from him to your petitioner seventeen thousand five hundred and twenty-seven dollars and eighty-seven cents. To that amount should have been added five hundred dollars that your petitioner paid, at the special request of Farrow, to Col. Edward Clark, who went out to Mobile as agent for Farrow, and had no money for his outfit; also, for supplies for ship Orris, at Mobile, two hundred and thirty dollars and seventeen cents; also, for services rendered at Mobile after 9th March, 1820, one thousand dollars; the same amount for services rendered in 1824, one thousand dollars; making an amount due from Farrow to your petitioner, 3d of March, 1825, the sum of twenty thousand two hundred and fifty-nine dollars and four cents. The three last sums named were not included in the action of the last Congress, and if entertained by the honorable the Court of Claims, proof will be introduced to establish their validity. Farrow, in acknowledging your petitioner's account, rendered him in 1824, did, after due and strict examination of the different charges, stipulate in writing to pay your petitioner as far as the appropriations of Congress should enable him to do so. March 3, 1825, Congress passed an act releasing Farrow & Harris from all claims which government had made on them; also to reinstate them in possession of all real and personal estate which they had assigned to government as collateral security for advances made them, with an addition of seventy-three thousand seven hundred and forty-seven dollars and seventy-eight cents in cash. All this property and money, by the act of March 3, 1825, was appropriated, first, for the payment of sub-contractors, and after that, if any overplus, to be equally divided between Farrow & Harris. The act of the 3d of March, 1825, also enjoined duties on the Secretary of War which is in proof that he, at least in part, failed to discharge, in consequence of which your petitioner has been deprived of receiving a large amount of money that has been justly due him over thirty years. The last action by the government on your petitioner's claim was by the last Congress. A bill was passed by the Senate for your petitioner's relief, for seventeen thousand five hundred and twenty-eight dollars and fifty-five cents, not the full amount of principal, and no interest, which your petitioner thinks should be allowed. The Senate bill was sent to the House of Representatives, had its first and second reading, referred to the Committee on Claims, who, after a lengthy and close examination, reported it back to the House with a recommendation that the bill do pass, but it did not pass, and but for one reason, as your petitioner believes, without a dissenting voice; it was not reached to have its final passage. Your petitioner has neither partners, agents, nor lawyers to act for him, but will rely on the kindness and indulgence of the court and solicitor for any informalities of his, that a decision may be made in accordance with justice and equity. And, as in duty bound, will ever pray.

ISRAEL KETCHAM.

STATE OF NEW YORK, *City of New York*, ss:

I, Elijah H. Riker, notary public, duly commissioned and sworn, dwelling in the city of New York, hereby certify that on the day of the date hereof, before me personally appeared Israel Ketcham, to me known, who, being duly sworn, did depose and say that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

ISRAEL KETCHAM.

In witness whereof, I have hereunto set my hand and notarial seal, and the said Israel Ketcham has subscribed his name hereto, at the city of New York, this second day of June, A. D. eighteen hundred and fifty-five.

ELIJAH H. RIKER, *Not. Pub. N. Y.*

IN THE COURT OF CLAIMS.

ISRAEL KETCHAM *vs.* THE UNITED STATES.

To the honorable the judges of the United States Court of Claims:

The petition of Israel Ketcham, of the city of New York, respectfully sheweth: That in the year 1818 Messrs. Farrow & Harris entered into a contract with the United States for the construction of a fortification at Dauphin island, at Mobile, and in the year 1819 the said Farrow & Harris also entered into a contract with your petitioner to furnish labor and materials for that purpose; and, in compliance with said contract, he took out from New York a number of mechanics and laborers, with provisions, implements, and materials, to Dauphin island, and expended in the fulfilment of said contract the sum of \$22,528⁵⁵/₁₀₀, of which sum there has been paid to him only the sum of \$5,000, leaving a balance due and unpaid of \$17,528⁵⁵/₁₀₀, as will more fully appear by the account hereto appended, marked A.

To said account the said Farrow, on the 10th day of March, 1824, appended the following acknowledgment, viz:

“Mr. Israel Ketcham has this day presented the within account, and can produce vouchers for the same if it should be required. I do hereby promise to Mr. Israel Ketcham, in the event of the government allowing the claim of Messrs. Farrow & Harris, contractors for the erection of fortifications on Dauphin island, his claim so far as it is right and just, and I do not know, at the present moment, anything to the contrary; but his claim is justly due to him, which shall be paid to him or his representatives, in the event of the government leaving it in the power of me to do so.

“Given under my hand this 10th day of March, 1824.

“N. FARROW.”

Your petitioner would further show that the erection of said fortification was subsequently abandoned by the government, and several

acts were subsequently passed by Congress for the relief of the contractors, the said Farrow & Harris, with the view of indemnifying them for the losses consequent upon the abandonment of the work by the United States; and on the third day of March, 1825, an act of Congress was passed, by which it was enacted as follows:

“ Be it enacted, &c., That the Secretary of War cause to be withdrawn and dismissed a suit which is now pending by the United States against Nimrod Farrow and his securities, for moneys advanced him by the United States as one of the contractors for erecting a fort on Dauphin island; and that the bond on which the suit was instituted be cancelled.

“ SEC. 2. And be it further enacted, That the Secretary of War cause to be delivered up and released, by proper conveyances, to Nimrod Farrow, contractor for erecting a fort on Dauphin island, all liens or securities which the United States may hold on property, real or personal, of the said contractor.

“ SEC. 3. And be it further enacted, That the proper accounting officers of the Treasury Department pay unto Nimrod Farrow, contractor for erecting a fort on Dauphin island, or to his legal representatives, the sum of seventy-three thousand seven hundred and forty-seven dollars and seventy-eight cents.

“ Provided, That the said Nimrod Farrow, before he shall receive any of the personal property to be delivered as aforesaid, and before he shall be entitled to receive the money above mentioned, shall enter into a bond to the Secretary of War with security to the acceptance of said Secretary, in the penal sum of \$120,000, conditioned that the said Nimrod Farrow shall appropriate the net proceeds of the personal property, and the money to be received, towards the payment of the debts contracted by Farrow & Harris, or either of them, or any other person or persons contracting under said Farrow & Harris for supplies furnished and services rendered in or about the erection of said fortification; and that, if there shall be any surplus after paying the said debts contracted as aforesaid, said Farrow shall pay to said Harris, or his legal representatives or assigns, his just proportion of said surplus; which bond shall be deposited by the Secretary of War, and it shall be the duty of said Secretary, upon the application of any of the parties interested therein, and satisfactory proof of the failure of said Nimrod Farrow to fulfil the conditions thereof, to cause the said bond to be prosecuted for the benefit of the party or parties making such application, and of such other person or persons as may have an interest in said bond.

“ SEC. 4. And be it further enacted, That an inventory be taken of such personal property as shall be returned to the said Farrow under the provisions of this act, and an estimate of its value be made, under such regulations as the Secretary of War may prescribe; and that there be paid to said Farrow such difference as exists between the value of the personal property at the time the same was taken possession of by the government and its return, together with the value of the personal property destroyed or lost while the same was in the possession of the government, except the same was lost or destroyed by the act of God.

“ SEC. 5. And be it further enacted, That the several sums to be

paid by the provisions of this act be paid out of any money in the treasury not otherwise appropriated."

Your petitioner would further show, that a bond was taken by the Secretary of War, in pursuance of the provisions of said act, and that Gilbert C. Russel was one of the sureties in said bond, and that he signed the same upon the express condition that he was to receive the property or money in lieu thereof, and pay the debts, which amounted to \$112,000; but the Secretary of War dismissed a suit which was then pending against Farrow & Harris on the part of the United States, and paid to the said Farrow & Harris the sum of \$73,000, but absolutely refused to return the property, out of the proceeds of which, and with the said \$73,000, the debts were to be paid; and upon a suit brought by a creditor of said Farrow & Harris, claiming the benefit of said act of Congress against said surety, he was discharged, on the ground that said Secretary had failed to execute the provision of said act in relation to said property.

Your petitioner further shows, that soon after the passage of said act he caused an application to be made on his behalf to the Secretary of War, to institute a suit on said bond against the principal and sureties in the same for his benefit, and at the same time filed with the Secretary the evidence of his claim as a sub-contractor of said Farrow & Harris, but the said Secretary neglected and refused to cause any suit to be instituted on said bond, or to adopt any measure for the application of said money and property towards the payment of the debt of your petitioner.

Your petitioner therefore claims that the provision of the act of Congress for the payment of the just and acknowledged debt of your petitioner, as a sub-contractor, was defeated by the wrongful act of the Secretary of War, both by his refusal to cause a suit to be instituted on said bond, and by his refusal to transfer said personal property according to the provisions of said act; and that his said refusal so to transfer said personal property in obedience to said act of Congress deprived the said petitioner of all remedy against the said sureties; and your petitioner has been wholly unable to collect his said debt, or any part of the same, from said Farrow & Harris, they being wholly insolvent, and no part of the same has since been paid.

Your petitioner therefore prays your honors to inquire into the matters aforesaid, and to grant such relief as to law and justice may appertain.

Adverse reports were made on this claim in the House of Representatives at the 2d session of the 20th Congress, (Rep. No. 19,) and the 1st session of the 23d Congress, (No. 495.) And in the Senate his petition was referred to the Committee on Claims at the 2d and 3d sessions of the 27th Congress, but no report made thereon.

At the 1st session of the 33d Congress, the Committee on Claims of the Senate made a favorable report on said claim, and a bill for the relief of your petitioner was passed for the payment of said sum of \$17,528 55, and by the resolution of the House of Representatives the same referred to this honorable court.

A.

Messrs. Farrow & Harris to Israel Ketcham, Dr.

25 barrels of corn meal, at \$5.....	\$125 00
7....do....prime pork, at \$17 50.....	122 50
7....do....beef, at \$14	98 00
3....do....do...mess, at \$16	48 00
5....do....pilot bread, at \$8.....	40 00
15....do....navy bread, at \$5.....	75 00
6 dozen chepping, at \$27.....	162 00
2....do....shovels, at \$12	24 00
1....do....spades, at \$12	12 00
3....do....knives and forks, at \$2.....	6 00
3....do....iron spoons, at \$1	3 00
1....do....tin cups, at \$1 50.....	10 50
5....do....tin plates, at \$2 50.....	15 00
3....do....mattresses and pillows, at \$36.....	108 00
1....do....hoes, at \$12.....	12 00
2 hedge-hogs, with apparatus, at \$20	40 00
1 fish seine, at \$60	60 00
6,638 feet white pine timber, at \$25.....	165 96
24 Rorum hats, at \$3.....	72 00
Box for the same, at \$1.....	1 00
194 pairs men's shoes, at \$1 50.....	291 00
2 boxes for same, at \$1	2 00
2 sets of harness, at \$15	30 00
3½ dozen wheelbarrows and gudgeons, at \$3 50	147 00
1 cart, at \$75.....	75 00
4 pairs cart wheels, at \$40.....	160 00
1 anchor, 600 cwt., at 10 cents per lb.....	67 00
2 pumps, boxes, &c., complete, at \$20.....	40 00
2 hhds. blocks, at \$200.....	200 00
156 lbs. iron, cwt., qr., lbs., at 8 cents	12 48
19 bales hay, average 4 cwt. 2 qrs. 0 lbs., at \$1 50	128 25
500 lbs. oakum, at 15 cents.....	75 00
57 cwt. 1 qr. 16 lbs. cordage, at 12 cents.....	753 76
1 8-inch cable, 12 cwt. 0 qrs. 0 lbs., at 8 cents	107 52
1 4-inch hawser, 2 cwt. 0 qrs. 0 lbs., at 9 cents.....	20 16
15 fathoms 13-inch cable, 7 cwt. 2 qrs. 0 lbs., at 9 cents.	67 20
2 kegs twist tobacco, 288 lbs, at 40 cents.....	115 20
1 keg hard tobacco, 135 lbs., at 30 cents	39 90
1 barrel roll tobacco, 168 lbs., at 30 cents	58 80
Barrel, at 37½ cents.....	37
1,624 feet timber framed for house, at 18 cents.....	292 00
Ship Orris, at \$1,600.....	1,600 00
For repairing agreed to be paid on her	348 75
For 160 passages from New York to Mobile, at \$30..	4,800 00
Wages paid for 100 men 2 months, average \$30 each	6,000 00
Board for the same, \$12 each, 2 months.....	2,400 00

Compensation for my own services	\$3,000 00
Discount on \$5,000 received	75 00
Expenses for going to Virginia after the same.....	80 00
1 dozen fancy chairs, delivered at Red Bluff, at \$3 50..	42 00
Cash paid Seth Belknap	300 00
	22,528 55
Cr. by cash received	\$5,000 00
Balance due I. Ketcham	17,528 55
	22,528 55

Articles of agreement made and entered into this 29th day of March, 1819, by and between Richard Harris, of Dauphin island, contractor for constructing fortifications on said island, and Israel Ketcham and Jacob G. Vandenberg, under the firm of Ketcham & Vandenberg. The said Ketcham & Vandenberg agree and contract to make or cause to be made and delivered at Dauphin island, all the bricks which the said Harris may require to complete and finish the fort which he has engaged to construct; and the said Ketcham & Vandenberg do hereby further agree that the bricks shall be well made and well burnt, and that they shall be such as the engineer or agent of the United States government shall approve and receive, and that the moulds in which the said bricks shall be moulded shall be made to measure ten inches in length, five inches in breadth, and three inches in thickness, and shall not be altered from that size except by mutual consent of the contracting parties. And the said Ketcham & Vandenberg do hereby further agree that they will deliver or cause to be delivered unto the said Harris, at Dauphin island aforesaid, one hundred thousand bricks, on or before the 1st day of August next, and one hundred thousand more in all August aforesaid, and three hundred thousand monthly thereafter until the 1st day of April, 1820, and from that time until the fortifications are completed eight hundred thousand shall be delivered monthly, or as many as the said Harris may want to keep his masons employed. The said Harris agrees and contracts to do everything reasonable to assist and aid the said Ketcham & Vandenberg in their operations to complete and execute their contract with him, and in case of his succeeding in getting possession of the red bluffs on the east side of Mobile bay, that he will permit the said Ketcham & Vandenberg to hold possession thereof until they shall have completed their contract, and at the expiration of which time the said Harris agrees to pay the said Ketcham & Vandenberg the value of their improvements, provided it does not exceed four thousand dollars, and provided that the said Ketcham & Vandenberg shall pay annually a reasonable rent for the said bluffs to the said Harris; and the said Harris further agrees and contracts to have two piers extended and built thirty feet into the water, as temporary places to receive bricks on until the 1st of November next, at which

time he agrees to build a wharf or wharves, as Captain Gadsden or his successor shall think proper to have built or erected, for the safe delivery of the said bricks. The said Harris agrees to receive the said bricks from or on the said wharf or wharves; he also agrees and contracts to pay the said Ketcham & Vandenberghe eleven dollars for each and every thousand bricks that they deliver in conformity with this contract. The said Harris further agrees to furnish the said Ketcham & Vandenberghe with provisions and such other articles as shall be wanted to execute the above written contract; and also to furnish, if required, five thousand dollars in cash, between this and the 1st of August next, provided the said Ketcham & Vandenberghe shall give good security for the said advance. It is understood by and between the contracting parties that all the advances made, either in cash or in provisions or other things, shall be refunded within nine months from the time such advances shall have been made; also that the bricks are to be paid for on delivery, if required.

Given under our hands and seals on Dauphin island, this 29th day of March, 1819.

[L. S.]
[L. S.]
[L. S.]

In presence of—

It is further understood that the said Ketcham & Vandenberghe are to hold possession of such part only of the said red bluffs as the parties may agree on, and in case of a disagreement the principal engineer for this station is to determine how much is necessary to carry on the brickery, cut timber, and cultivate for their men and cattle; and that the said Harris is to be consulted concerning all the improvements to be paid for by him, and if his title should prove bad, he is to pay for such improvements only as he shall hereafter direct.

RICH'D HARRIS. [L. S.]
ISRAEL KETCHAM. [L. S.]
JACOB G. VANDENBERGH. [L. S.]

In presence of—

J. CLINE.

A. GREEN.

It is agreed and understood by and between Richard Harris and Ketcham & Vandenberghe, that the said Vandenberghe, agreeably to his wish, is released from the contract, and that the said Ketcham is to deliver one-half of the bricks agreeably to the times and upon the terms mentioned first in this contract.

RICH'D HARRIS. [L. S.]
ISRAEL KETCHAM. [L. S.]
JACOB G. VANDENBERGH. [L. S.]

Test:

J. CLINE.

BOSWELL ALSOP.

I. KETCHAM *vs.* THE UNITED STATES.

Admitted in evidence.

J. D. McPHERSON,
Deputy Solicitor.

WASHINGTON, *July 3, 1854.*

The act of Congress of 1825, for the relief of Harris & Farrow, directing that \$73,000 should be paid to them, and all their property in Alabama, which had been mortgaged or conveyed in trust, estimated at \$12,000, should be returned to them or paid for, unless it had been destroyed or lost by the act of God, never was executed. The act required Harris & Farrow to give bond and security in the sum of \$120,000 that the proceeds of the property, with the \$73,000, should be applied to the payment of any debts contracted by them or their agents for work done or materials delivered, &c., &c. This was done, and I signed the bond on condition that I was to receive the property, or money in lieu thereof, and pay the debts, which amounted to \$112,000. The Secretary of War, in accordance with the requirements of the act, dismissed a suit then pending against Harris & Farrow, and paid the \$73,000, but absolutely refused to give an order for a return of the property, out of the proceeds of which their debts were to be paid. I was sued by Roland Clapp, who claimed \$6,000, and was held to bail; from the order to hold me to bail I was discharged, upon the ground that the Secretary of War had failed to execute the provisions of the act, whereupon Clapp dismissed his suit. Had the Secretary complied with this, the most important provision of the act, the just debts of Harris & Farrow would have been paid forthwith; but, by the ignorance, or something worse, of the Secretary of War, he positively refused to execute this part of the law, and the debts due for "work done and materials delivered" were not paid. Having had my right arm badly broke, and the wrist joint dislocated, not only makes my writing bad, but painful; therefore if the committee desire explanations or further information, and will send for me, it will be an easy matter to give it verbally.

This statement is made at the request of the Committee on Claims of the Senate as communicated to me by Mr. Spencer.

GILBERT C. RUSSELL.

COUNTY OF WASHINGTON, *District of Columbia, ss:*

Personally appeared before me, C. W. C. Dunnington, a justice of the peace in and for the county aforesaid, Gilbert C. Russell, who, being duly sworn, says the foregoing statements are correct and true.

G. C. RUSSELL.

Sworn to and subscribed before me this 5th July, 1854.

C. W. C. DUNNINGTON,
Justice of the Peace.

Admitted in evidence.

JOHN D. McPHERSON,
Deputy Solicitor.

STATE OF MICHIGAN, *Lenawee County, ss:*

Be it remembered that on this 2d day of October, A. D. 1851, personally came before me, Lucius G. Sholes, a justice of the peace in and for said county, Jacob Ketcham, of the said county of Lenawee, to me well known, who, having been duly sworn, deposeth and saith: That in the fall of 1819 this deponent was living at Ithica, Tompkins county, New York, and entered into a contract with his brother, Israel Ketcham, of the city of New York, to go to Dauphin island, at the outlet of Mobile bay, for the purpose of making brick for the fortifications then erecting at that place for the government of the United States, under a contract with one Nimrod Farrow, to whom the said Israel Ketcham was a sub-contractor; that the deponent left home about the 1st of October, in the year aforesaid, and arrived in the city of New York about the 10th of the same month, where he found his said brother engaged in fitting and repairing the ship called the "Orris," which he had purchased for the purpose of transporting the hands, implements, provisions, &c., to the said island for the prosecution of the said work; that this deponent was present, and assisted in loading said vessel with a large quantity of provisions, consisting of beef, pork, flour, corn meal, ship and navy bread, potatoes, beans, and other vegetables; also a quantity of tools and implements, such as spades, shovels, and axes, carts, cart wheels, wheelbarrows and wheelbarrow wheels, and a quantity of shoes, hats, tobacco, and hay in bales; also new rigging for a number of small vessels which were calculated to have been built at Fowl river for the purpose of carrying materials to the said island for completing the said works; and that a number of persons were also hired and shipped on said vessel as mechanics and laborers for the said works, to the number, as this deponent thinks, of 150, who were to receive as wages from twenty to fifty dollars per month; and that the said vessel sailed from the port of New York, this deponent thinks, about the 1st of November, in the year aforesaid, and arrived at said island after a passage of 23 days; and that soon after the landing of mechanics and laborers aforesaid many of them deserted the service of the said Israel Ketcham, without making him any compensation whatever for their passage or board, much to the damage of the said Israel Ketcham, as this deponent verily believes; that this deponent assisted in keeping the books of his said brother, and was present at the payment of said hands, and was personally knowing to the fact of all of them who remained and labored on the said works receiving full pay and satisfaction of the said Israel Ketcham; and that, at about the expiration of two months from the arrival of said ship and

cargo at the said island, the said Nimrod Farrow came to the said island, which was a considerable time after he had engaged with my said brother to be there, as this deponent heard him, the said Farrow, declare, and this deponent heard the said Farrow express his entire satisfaction with the general management and prosecution of the said works by the said Israel Ketcham; and the said Farrow further observed that he (Ketcham) should lose nothing by his said detention or by the contracts the said Ketcham had made for the prosecution of said works, and also that all engagements of the said Farrow with the said Ketcham should be satisfactorily arranged and settled with the said Israel Ketcham. And this deponent further saith that soon after the arrival of the said Farrow he purchased the ship Orris of the said Israel Ketcham, together with all the remainder of the said stock of provisions, tools, implements, and rigging, but at what price and upon what terms this deponent knows not. And further this deponent saith not.

JACOB KETCHAM.

Sworn and subscribed before me at Tecumseh this 2d day of October, A. D. 1851.

LUCIUS G. SHOLES,
Justice of the Peace.

STATE OF MICHIGAN, *Lenawee County Clerk's Office, ss:*

I hereby certify that Lucius G. Sholes, esq., whose name is subscribed to the annexed and foregoing certificate of deposition, was at the date thereof, and still is, a justice of the peace in and for said county, duly qualified and authorized by the laws of the State to take the same, and to all of whose official acts as such justice of the peace full faith and credit are due and ought to be given; and that I am well acquainted with the handwriting of the said Lucius G. Sholes, and verily believe his signature subscribed to the annexed and foregoing certificate of deposition is genuine.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of the circuit court for said county, at Adrian, this 2d day of October, A. D. 1851.

CHARLES CHANDLER,
Clerk of said court and county.

DISTRICT OF COLUMBIA, *City of Washington, ss:*

On this 18th day of December, 1856, personally appeared before the subscriber, a justice of the peace within and for the city and District aforesaid, Israel Ketcham, who, being duly sworn according to law, declares that the papers and documents in relation to his claims filed with his petition to the Congress of the United States, and by the House of Representatives ordered to be referred to the Court of Claims, are lost, or a portion of them, and those papers purporting to be copies of original papers which have been lost or mislaid, now pre-

sented by him to said Court of Claims, are true and perfect copies of the originals, both in words and figures; that the loss of said original papers was without fault or negligence on his part, and for which he is not responsible. The deponent further declares that he presented his account and claim to Nimrod Farrow sometime during the year of 1824; that its correctness was then acknowledged by said Farrow, who then promised to pay the amount thereof to the deponent should an appropriation by Congress be made which would enable him to do so, as set forth in paper marked A. The deponent further states that an act passed Congress, and was approved on the 4th March, 1825, appropriating money and making provision for the payment of the claims of the sub-contractors engaged on the works under the aforesaid Nimrod Farrow and — Harris, as mentioned and particularly referred to in the before-mentioned papers; and in consequence of the aforesaid act your deponent called upon the said Nimrod Farrow, at his residence, in Fauquier county, in the State of Virginia, and demanded of said Farrow payment of the amount of his said claim, viz: \$17,528 55, and that said Farrow then made no objection to the amount thereof, or to its payment, except his inability to pay it, alleging that he had disposed of all the money appropriated by the act of Congress aforesaid which had come into his hands, but that money enough would soon be received by him to pay all just demands, &c. The deponent further declares that, placing no further reliance upon the promises of said Farrow, and that no money in payment of his said claim was likely to be realized from that source, proceeded to obtain the necessary vouchers to establish his claim and to meet any objection that might arise against its validity; that subsequently his said account, with all the original depositions and proofs in support of it, were placed in the hands of the Hon. C. C. Cambreleng, then a member of the House of Representatives, with his petition to Congress for relief; that in the various stages of the proceedings of Congress in relation to his said claim, his original papers and documents, or a portion of them, have been lost, and that he has made every effort in his power to recover the same, without effect, and that the same have not since been in his possession. Your deponent further declares that before he presented to Congress his said petition and original papers and proofs, he made, or caused to be made, and has preserved, true and accurate copies thereof, which copies so made at that time are the identical papers and copies which he now presents to the Court of Claims.

The deponent also further declares that Jacob Ketcham, his brother, John Hogan, William Thomas, and Seth Belknap, are dead, and that Walter Case, as he was informed about a year since by his wife, was imbecile in body and mind—he was then eighty years old or thereabouts—and further, that Thomas Ketcham is also dead.

ISRAEL KETCHAM.

Sworn to and subscribed before me the day and year first above written.

F. S. MEYER,
Justice of the Peace.

STATE OF NEW YORK, *City of New York*, ss :

Walter Case, late of Newburgh, county of Orange, and State of tenth Congress, from Orange county, in said State, the full term of New York, attorney and counsellor of law, now of Fishkill, county of Dutchess, and State aforesaid, having been duly sworn, doth depose and say, that he served as a representative in the six-two years; that during all that term, and ever since, he has been intimately acquainted with Israel Ketcham, the petitioner in the annexed petition named, and believes him to be an honest man, who would disdain to commit a fraud on the government or an individual. Deponent was at the house of said Ketcham, in the city of New York, on or about the first of November, 1819, when said Ketcham was about embarking with his family on board a ship then lying at anchor near the house of said Ketcham, in the harbor of New York, for the purpose of proceeding to Dauphin island, at or near the entrance of Mobile bay, to fulfil a contract which he, the said Ketcham, had made as sub-contractor with Nimrod Farrow, for building fortifications for the government on Dauphin island, at or near the entrance of Mobile bay.

Deponent had a clear view, from the windows of said house, of said ship, and the transactions on board the same, and saw large quantities of provisions, tools, and men going on board of said ship, from time to time, at the instance of said Ketcham, and for the purpose of performing his said contract with the said Nimrod Farrow, as this deponent was at that time informed by the said Ketcham; and said Ketcham was to make the brick for said fortifications, or procure them to be made, and find provisions for the men; which said deponent believes to be true. And that said Ketcham did proceed to Dauphin island with said ship, and arrived safely with his provisions, tools, and family, and forthwith entered upon the performance of his said contract, and actually performed said contract to the satisfaction of the said Farrow and the government of the United States, as deponent was at that time informed, and believes. During the first session of the sixteenth Congress deponent was in the habit of corresponding with said Ketcham after his arrival in Mobile bay; said Ketcham's wife was deponent's sister, and deponent, on that account, felt a deep interest in his success, and that he should not lose by his said contract with Nimrod Farrow, as aforesaid. During the first session of the sixteenth Congress deponent became satisfied, from his intercourse with members of Congress and the heads of departments, that no further appropriations would ever be made by Congress for erecting said fortifications on Dauphin island, and deponent wrote to the said Ketcham to that effect, according to the best of his recollection. After giving this information, deponent, at the request of said Ketcham, spoke to John C. Calhoun, then Secretary of War, to know if said Ketcham could place any reliance on government to pay his just demands against Farrow, under his contract, in case of a suspension of building the fortifications on Dauphin island. Mr. Calhoun's reply was, that the government would not be responsible to a sub-contractor, unless an act of Congress should be passed for their

relief, yet the just claims of said Ketcham would be protected as far as it would be in the power of the department to do so, or words to that effect.

On the 3d day of March, 1825, as this deponent has been informed and believes, an act was passed appropriating (\$73,748 78) seventy-three thousand seven hundred and forty-eight dollars and seventy-eight cents for the payment of sub-contractors for erecting said forts, but not one cent of said appropriation was ever paid to the said Ketcham, as this deponent has been informed and believes. Deponent *knows* that the Hon. Parmenis Adams, a member of Congress, acted as agent for the said Israel Ketcham after the said act was passed providing for the pay of sub-contractors, as aforesaid, under the said Farrow & Harris, because the said Parmenis wrote to this deponent at Newburgh, from Washington, in the absence of the said Ketcham, saying that he had applied to Mr. Barber, the Secretary of War at that time, in behalf of said Ketcham, to have suits brought against the said Nimrod Farrow and his securities, in behalf of the sub-contractors aforesaid, and that Mr. Barber assured him that said Ketcham should be paid; and, finally, that said Adams enclosed to deponent the paper which fully established the claim of the said Ketcham against the said Farrow and the government, by Farrow's acknowledging, in writing, the amount due him, the said Ketcham, under his own signature, as deponent was informed at that time, and verily believes to be true. Deponent has examined a copy of an account, which is hereunto annexed, rendered by said Ketcham against said Farrow & Harris, and acknowledged by said Farrow as being justly due to said Ketcham, amounting to between seventeen and eighteen thousand dollars, and has no doubt the amount so charged is correct, and should be paid, with interest; and deponent also saith, that such was the intimacy existing between this deponent and the said Ketcham, and so intimately was deponent acquainted with the business of the said Ketcham at that time, and the state of his pecuniary affairs, that deponent verily believes it would have been impossible for the said Ketcham to have received the amount due him from the said Farrow without the knowledge of this deponent, or any considerable portion thereof; and deponent also saith that he verily believes that the whole amount admitted by the said Farrow in his acknowledgment, hereunto annexed, as being then due to said Ketcham, is still due and owing to him, and that great injustice will be done to him if it should not be forthwith paid by the government. Deponent knows, and states with confidence, that owing to the failure of said Farrow and the government to perform their promises and undertakings aforesaid with the said Ketcham, he was greatly embarrassed in his circumstances, having paid out large sums of money for said ship, provisions, wages, and tools, without remuneration. Deponent further saith, that he has examined with great care and attention the annexed voucher, marked A, and believes it to be a true copy of the original account of the said Ketcham transmitted to deponent by said Parmenis Adams aforesaid, and which the said Nimrod Farrow had acknowledged in writing to be justly due to said

Ketcham, as aforesaid, as appears from said voucher A. And further this deponent saith not.

WALTER CASE.

Sworn before me the 25th day of June, 1851.

WM. L. MORRIS,
Com'r of Deeds, &c.

Admitted in evidence.

JOHN D. McPHERSON,
Deputy Solicitor.

I hereby certify that I am a physician, residing in the town of Fishkill, county of Dutchess, State of New York; that I know Walter Case, and occasionally prescribe for him, and I do not think him capable of giving testimony on any subject, in consequence of the decay of his mental faculties from age.

THEODORE V. W. ANTHONY.

FISHKILL, *Dutchess County*, November 28, 1857.

DUTCHESS COUNTY, ss:

On the thirtieth day of November, one thousand eight hundred and fifty-seven, before me personally came Theodore Van Wyck Anthony, to me known to be the individual whose signature is signed above, and he, the said Anthony, did acknowledge that he signed the same, and that the statement made above his signature is correct to the best of his belief.

ALFRED W. LOMAS,
Justice of the Peace.

Sworn on the day and date above written.

IN THE COURT OF CLAIMS.

ISRAEL KETCHAM *vs.* THE UNITED STATES.

The within affidavit is regarded as bringing the witness Walter Case within the rule laid down by the court in the cases of Nock, Ketcham, and Guilbean, and it is therefore agreed that his *ex parte* affidavit in this case may be read in evidence.

JNO. D. McPHERSON,
Deputy Solicitor.

To the honorable the Senate and House of Representatives of the United States of America, in Congress assembled:

The petition of Israel Ketcham, of the city of New York, respectfully states that your petitioner had the misfortune of being engaged

as a sub contractor in the erection of fortifications on Dauphin island, at the entrance of Mobile bay, during the years 1819 and 1820. In the year 1819 your petitioner contracted with Nimrod Farrow, then in the city of New York, to take out to Mobile a large number of mechanics and laborers, with provisions and other supplies, tools, implements, and materials for building the said fortifications.

Your petitioner, in the faithful fulfilment of his agreement, proceeded to transport a large number of mechanics, and other laborers, provisions and other materials, from the city of New York to Mobile, and in every respect complied with his agreement with the said Farrow. In consequence, however, of the failure of the said Farrow to make the advances to your petitioner which he had stipulated to do in his said agreement, your petitioner, in order to accomplish what he had undertaken, found himself compelled not only to spend his last dollar, but to incur heavy responsibilities. Your petitioner not only furnished the articles agreed to be supplied by him, but went out in person to Dauphin island, and spent a considerable part of the years 1819 and 1820 in efforts to aid the contractors in the completion of their work. The supplies furnished by your petitioner in pursuance of his agreement amounted in the whole to \$22,528 87, on which the only amount ever received by your petitioner from the said Farrow & Harris, or either of them, was \$5,000, and \$500 of that amount was paid to Colonel Edward Clark at the particular request of said Farrow, and omitted to be charged in your petitioner's bill rendered to said Farrow, leaving a balance due your petitioner of \$18,028 87. Such is the origin and nature of your petitioner's claim. And if the personal sufferings of your petitioner could enhance his claims to the favorable consideration of your honorable bodies, he might truly add, that the sums so expended and responsibility incurred by your petitioner occasioned nearly his utter ruin—depriving him of the little property he then possessed, embarrassing his affairs, and injuring his health for years, on account of fatigue and exposure in a sickly climate, and leaving him with a family, to struggle against all the evils of poverty. The Congress of the United States became aware of the difficulties and losses sustained by your petitioner, in common with other sub-contractors under Farrow & Harris, and with a view, as your petitioner believes, of providing for cases similar to that of your petitioner, on the third day of March, 1825, passed a law appropriating the sum of \$73,747 78 for the benefit of sub-contractors who had just and *bona fide* claims. Unfortunately, however, for your petitioner, the law provided that the same should be paid in the first instance to Nimrod Farrow, to be by him expended in the discharge of the claims of the sub-contractors, the law requiring the said Farrow first to give satisfactory bonds to the honorable the Secretary of War that the money should be faithfully supplied by said Farrow. Bonds were given, and \$58,747 78 of the money was received by said Farrow; but instead of being applied in satisfaction of the claims of those who had contributed their time and money to the erection of the said fortification, was expended, to a very great extent, in a manner and for purposes totally foreign to the intention and positive direction of the act, and the Congress who passed it. Your petitioner

was ready and prepared with the proofs of his claim—his account having been examined by Nimrod Farrow in March, 1824—and Farrow then provided in writing to pay the balance of your petitioner's account out of such money as might be appropriated by the government; and in pressing his claims upon Congress, said Farrow would frequently refer to the sufferings of your petitioner and the justness of his claims, in order that Congress might be more strongly induced to make an appropriation to alleviate the sufferings of your petitioner, notwithstanding which your petitioner received not one cent of the amount so appropriated and paid.

In consequence of such misapplication of the moneys appropriated, your petitioner, by his agent, Hon. Parmenio Adams, who was member of Congress, applied, under the provisions of said act, to the Secretary of War, soliciting the payment of your petitioner's claim, or requiring him to cause suits to be instituted on the bond, in the mode prescribed in said act. Mr. Barbour, the Secretary of War, told Mr. Adams that it was unnecessary to institute suits against Farrow and his sureties, as by the act allowing Farrow pay for slaves in Alabama, and other additional allowances, there would be more money coming to Farrow, in addition to the moneys that had already been paid him, than would be required to pay your petitioner and other just claims growing out of the demands of sub-contractors; and, that your petitioner might rest easy, his demands should be paid, and that no more money should be paid to Farrow until your petitioner's claim was satisfied. Your petitioner then supposed he would very shortly have the amount of his demand, and believes that the honorable the Secretary of War had no doubt but that his promises made to your petitioner's agent to pay your petitioner was made in good faith, for two reasons: first, the honorable the Secretary of War no doubt thought that the money would be forthwith coming from additional credits which he believed Farrow entitled to; and secondly, if means were not procured in that way, then your petitioner would be paid out of any money in the treasury not otherwise appropriated, on application to Congress, as Congress, by their act of March 3, 1825, and their bond of indemnity, assumed the payment of petitioner's claim. Your petitioner further respectfully states that he conscientiously believes that government is bound in equity and justice to pay your petitioner the amount due your petitioner at the time of his settlement with Farrow, with interest from the 3d March, 1825; and your petitioner would beg leave to assign the following reasons: Firstly, because Farrow, after examining your petitioner's account, and acknowledging its correctness, did stipulate in writing that the same should be paid so far as the appropriations of government should enable him to do so. Secondly, because the act of the 3d of March, 1825, provided that your petitioner should be paid as Farrow had stipulated in writing it should be done. Thirdly, the bond of indemnity taken by the Secretary of War bound government to the fulfilment of its requirements, which were, that the sub-contractors should first be paid out of the moneys appropriated for their special benefit by the act of the 3d March, 1825. Fourthly, the refusal or neglect of the Secretary of War to institute suits for your petitioner against Farrow and his

securities, as the act of the 3d of March, 1825, directed he should do on application of any sub-contractor who might feel himself aggrieved, and by his promise to see your petitioner paid, renders the responsibility of the government to your petitioner conclusive, as your petitioner conceives and verily believes. Your petitioner would further respectfully represent another important fact which has come to your petitioner's knowledge, from investigations made and promulgated through Peter Hagner, esq., 29th Congress, first session, which is, that \$15,000 of the \$73,747 78 appropriated expressly for the payment of your petitioner's just claim against Farrow and Harris was retained in the treasury and passed to the credit of Nathaniel Cox, after your petitioner's demand on the Secretary of War, through his agent, Mr. Adams, without sanction of law, as your petitioner is informed, and to the prejudice of your petitioner to the amount of that sum, with interest from the 3d of March, 1825, up to the time that it may be received by your petitioner. The Committee on Claims of the honorable the Senate, in their report, submitted by Mr. Ruggles, 25th Congress, 2d session, say: "All the money received under the act of the 3d of March, 1825, ought to be refunded in order that it might be applied by a more faithful agent, (alluding to Farrow,) in the payment of the debts of a meritorious and suffering class of creditors, for whose benefit that act was exclusively passed. From facts already stated, your petitioner cannot doubt the favorable consideration of your honorable bodies to the justness of his claim; and, as in duty bound, will ever pray.

ISRAEL KETCHAM.

STATE OF NEW YORK, *City and County of New York, ss:*

On this tenth day of December, in the year 1850, personally appeared before me, the undersigned, a commissioner of deeds in and for the city and county of New York, duly appointed, Israel Ketcham, to me known, who, being by me duly sworn, deposes and says that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that the same is in all respects true, to the best of his knowledge, information, recollection, and belief.

ISRAEL KETCHAM.

Subscribed and sworn to before me this 10th day of December, 1850.

JAMES T. BOYD,

Commissioner of Deeds.

A.

Messrs. Farrow & Harris to Israel Ketcham,

DR.

25 bbls. corn meal, at \$5.....	\$125 00
7 bbls. prime pork, at \$17 50.....	122 50
7 bbls. beef, at \$14.....	98 00
3 bbls. beef, mess, at \$16.....	48 00
5 bbls. pilot bread, at \$8.....	40 00
15 bbls. navy bread, at \$5.....	75 00

6 dozen chopping axes, at \$27.....	\$162 00
2 dozen shovels, at \$12.....	24 00
1 dozen spades, at \$12.....	12 00
3 dozen knives and forks, at \$2.....	6 00
3 dozen iron spoons, at \$1.....	3 00
7 dozen tin cups, at \$1 50.....	10 50
5 dozen tin plates, at \$2 50.....	15 00
3 dozen mattresses and pillows, at \$36.....	108 00
1 dozen hoes, at \$12.....	12 00
2 hedge hogs, with apparatus, at \$20.....	40 00
1 fish seine, at \$60.....	60 00
6638 feet white pine boards, at \$25.....	165 96
24 Roram hats, at \$3.....	72 00
1 box for the same, at \$1.....	1 00
194 pair men's shoes, at \$1 50.....	291 00
2 boxes for the same, at \$1.....	2 00
2 sets harness, at \$15.....	30 00
3½ dozen wheelbarrows and gudgeons, at \$3 50.....	147 00
1 cart, at \$75.....	75 00
4 pair cart-wheels, at \$40.....	160 00
1 anchor, 600 cwt., at 10 cents per pound.....	67 00
2 pump boxes complete, at \$20.....	40 00
2 hhds. blocks, at \$100.....	200 00
156 lbs. iron, at 8 cents.....	12 48
19 bales hay, average 4 cwt. 2 qr., at \$1 50.....	128 25
500 lbs. oakum, at 15 cents.....	75 00
57 cwt. 1 qr. 16 lbs. cordage, at 12 cents.....	753 76
⅛ inch cable, 12 cwt., at 8 cents.....	107 52
¼ inch hawser, 2 cwt., at 9 cents.....	20 16
15 fathoms 13-inch cable, 7 cwt. 2 qr., at 9 cents.....	67 20
2 kegs twist tobacco, 288 lbs., 40 cents.....	115 20
1 keg hand tobacco, 135 lbs., at 30 cents.....	39 90
1 bbl. roll, 168 lbs., at 13 cents.....	58 80
1 bbl., at 37 cents.....	37
1624 feet timber framed for house, at 18 cents.....	292 00
Ship Orris, at \$1,600.....	1,600 00
For repairs agreed to be paid on her..	348 75
For 160 passages from New York to Mobile, at \$30.....	4,800 00
Wages paid for 100 men two months, average \$30 each...	6,000 00
Board for the same, \$12 each, 2 months.....	2,400 00
Compensation for my own services.....	3,000 00
Discount on \$5,000 received.....	75 00
Expenses for going to Virginia after the same.....	80 00
1 dozen fancy chairs delivered at Red Bluffs, at \$3 50.....	42 00
Cash paid Seth Belknap... ..	300 00
	22,528 55
By cash received.....	\$5,000 00
Balance due I. Ketchum.....	17,528 55
Mr. Farrow's acknowledgement.....	22,528 55

Mr. Israel Ketcham has this day presented the within account, and can produce vouchers for the same if it should be required. I do hereby promise to Mr. Israel Ketcham, in the event of the government allowing the claim of Messrs. Farrow & Harris, contractors for the erection of fortifications on Dauphin island, his claim, so far as it is right and just, and I do not know, at the present moment, anything to the contrary; but his claim is justly due to him, which shall be paid to him, or his representatives, in the event of the government leaving it in the power of me to do so.

Given under my hand this 10th day of March, 1824.

N. FARROW.

B.

I certify and declare that I was in Mobile county, State of Alabama, during the year 1819, and know that Israel Ketcham arrived in Mobile bay in the ship Orris, having on board one hundred and sixty or seventy laboring men and mechanics, to be employed in erecting a fortification at Dauphin island, and that the said laborers and mechanics were brought over to Mobile at the instance and request of Nimrod Farrow, esq., of Virginia, one of the contractors to build the said fortification. I also know that a large supply of provisions and implements of different kinds for carrying on the works were brought out in the Orris by the said Ketcham, and that said provisions, &c., were applied for by the agents of Farrow & Harris at the Red Bluffs, and considerable quantities, I believe, were delivered to them; thirty dollars is the lowest price that I know of men being carried from New York to Mobile for during the fall of 1819; I was well acquainted with the books and accounts of Israel Ketcham, and know that most of the men employed by him were paid off in full. I was present when, in the spring of 1819, Israel Ketcham contracted with Richard Harris to make a large quantity of brick for the fortification at Dauphin island, and know that Harris agreed to let Ketcham have possession of the Red Bluff for making the brick, in case Harris should succeed in getting a lease of it; and I also know that Harris refused to let Ketcham have the possession at the Red Bluffs, as he had agreed to do, on account of which refusal said Ketcham was subject to and suffered great inconvenience, disappointment, and loss.

THOMAS KETCHAM.

Sworn to before P. H. Wendell, notary public, in Albany, State of New York.

C.

CITY OF NEW YORK, ss:

William Thomas, of the city of New York, being duly sworn, deposeth and saith that he is well acquainted with Israel Ketcham, of said city. Deponent has always understood and believes that said

Ketcham was employed as a sub-contractor, under Farrow & Harris, in the construction of fortifications at Mobile and Dauphin island; that in the years 1823 and 1824 deponent was at Washington city, and was acquainted there with said Farrow; that deponent conversed with said Farrow about Mr. Ketcham's claim against him, and deponent says that said Farrow several times said that he was anxious that government should make an appropriation for his benefit, that he might be able to pay Mr. Ketcham about seventeen thousand dollars, which he owed said Ketcham for work and materials done and furnished by said Ketcham for the said fortifications at Mobile and Dauphin island. Said Farrow said that said Ketcham had sent a ship with laborers and materials. The conversation above alluded to occurred, in the absence of said Ketcham, at Farrow's rooms, in the city of Washington. Deponent had not and has not any interest in Mr. Ketcham's claim whatever, except as a mere acquaintance.

WILLIAM THOMAS.

Sworn to before H. Meigs, December 9, 1833.

D.

CITY OF NEW YORK, ss:

John Hogan, of said city, being duly sworn, deposeth and saith that in the year 1819 he was engaged by Israel Ketcham, of said city, to go with a company of workmen of various descriptions—pit-sawyers, ship-carpenters, house-carpenters, laborers, bakers, &c.—amounting to about one hundred and seventy-one persons, in the ship *Orris*, Captain Green, to Mobile bay, for the purpose of building a fort for the United States; that the whole party was provided with food and lodging, and paid by said Israel Ketcham; that after being there about two months the work was discontinued, as he believes, by order of government; that deponent was paid about \$77 by Ketcham for his work, and was found by him in passage, food, and lodging; deponent believes that the whole party was in some way fully paid and found in passage, food, and lodging by said Ketcham; the party remained there more or less of two months; deponent understood at the time that said Ketcham bought the said ship for the purpose of transporting said party to Mobile, with carts, wheelbarrows, axes, and other implements for the work; hay for horses, provisions for men, flour, bread, beef, and pork, and whiskey in large quantities, plenty for all hands; and deponent says that he believes that said Ketcham paid all the said party their respective wages and claims in full, and that their wages were at the least, on an average, thirty dollars each per month.

JOHN HOGAN.

Sworn to before H. Meigs, September 20, 1833.

E.

STATE OF NEW YORK, *Orange County*, ss:

Personally appeared before me, the subscriber, a justice of the peace in and for the county aforesaid, Seth Belknap, of the village of Newburg and county aforesaid, to me personally known to be a creditable witness, who, having been duly sworn according to law, doth depose and say that he is well acquainted with Israel Ketcham, of the city of New York and State aforesaid, and has been acquainted with him ever since the year one thousand eight hundred and nineteen, and believes him to be a man of good character, and upright in his dealings; deponent was also acquainted with Colonels Richard Harris and Nimrod Farrow, now, as deponent understands, both deceased, who entered into a contract with the government of the United States for building a fortification at Dauphin island, in the State of Alabama; deponent was a sub-contractor under the said Farrow & Harris, as was also the said Ketcham; that during the spring and summer of 1819 said Ketcham was under heavy expenses, made with Richard Harris, for making brick, and afterwards, in the fall of 1819, under contract with Nimrod Farrow, said Ketcham was at very great expense in taking out from the city of New York to Alabama a large number of mechanics, laborers, tools, implements, &c., for building the fort on Dauphin island; and that said Ketcham was actively employed in aiding, with all his men, the erection of the fort on Dauphin island, until the spring of 1820, when it was understood that government declined making any further appropriations towards erecting a fort on Dauphin island; and further this deponent saith not.

SETH BELKNAP.

Sworn to before Ward M. Gazley, justice of the peace, December 2, 1833.

F.

TERRITORY OF MICHIGAN, *Lenawe County*, to wit:

Be it remembered that, on this twenty-fourth day of October, A. D. one thousand eight hundred and thirty-three, personally came before me, Ross Wilkins, one of the judges of the supreme court of said Territory, Jacob Ketcham, of the said county of Lenawe, to me well known, who, having been duly sworn, deposeth and saith that in the fall of 1819 this deponent was living at Ithaca, Tompkins county, New York, and entered into a contract with his brother, Israel Ketcham, of the city of New York, to go to Dauphin island, at the outlet of Mobile bay, for the purpose of making brick for the fortifications then erecting at that place for the government of the United States, under a contract with one Nimrod Farrow, to whom the said Israel Ketcham was a sub-contractor; that the deponent left home about the first of October, in the year aforesaid, and arrived in the city

of New York about the tenth of the same month, where he found his said brother engaged in repairing and fitting the ship called the Orris, which he had purchased for the purpose of transporting the hands, implements, provisions, &c., to the said island for the prosecution of said work; that this deponent was present and assisted in loading said vessel with a large quantity of provisions, consisting of beef, pork, flour, corn meal, ship and navy bread, potatoes, beans and other vegetables, also a quantity of tools and implements, such as spades, shovels and axes, carts, cart-wheels, wheelbarrows, wheelbarrow wheels, and a quantity of shoes, hats, tobacco, hay in bales, also new rigging for a number of small vessels which were calculated to have been built at Fowl river for the purpose of carrying materials to the said island for completing said works, and that a number of persons was also hired and shipped on board of said vessel as mechanics and laborers for the said works to the number, as this deponent thinks, of one hundred and fifty, who were to receive as wages from twenty to fifty dollars per month, and that the said vessel sailed from the port of New York, this deponent thinks, about the first of November in the year aforesaid, and arrived at said island after a passage of twenty-three days, and that soon after the landing of the mechanics and laborers aforesaid many of them deserted the service of the said Israel Ketcham without making him any compensation whatever for their passage or board, much to the damage of the said Israel Ketcham, as this deponent verily believes; that this deponent assisted in keeping the books of his said brother, and was present at the payment of said hands, and was personally knowing to the fact of all those who remained and labored on the said works receiving full pay and satisfaction of the said Israel Ketcham, and that at about the expiration of two months from the time of the arrival of said ship and cargo at the said island the said Nimrod Farrow came to the said island, which was a considerable time after he had engaged with my said brother to be there, as this deponent heard him declare, and this deponent heard the said Farrow express his entire satisfaction with the general management and prosecution of the said works by the said Israel Ketcham; and the said Farrow further observed to the said Israel Ketcham that he (Ketcham) should lose nothing by his said detention, or by the contracts the said Ketcham had made for the prosecution of said works, and also that all engagements of the said Farrow with the said Ketcham should be satisfactorily arranged and settled with the said Ketcham; and this deponent further saith that soon after the arrival of the said Farrow he purchased the ship Orris of the said Israel Ketcham, together with all the remainder of the said stock of provisions, tools, implements, rigging, &c., but at what price or upon what terms this deponent knows not. And further this deponent saith not.

JACOB KETCHAM.

Sworn to and subscribed, at Tecumseh, the 24th of October, A. D. 1833, before

ROSS WILKINS,
Judge Supreme Court.

G.

We have long known Israel Ketcham, of the city of New York, formerly of Dutchess county, and we cheerfully certify that we believe him to be a man of good character, and that we would give full credit to his declarations on oath relative to his own affairs.

Herman P. Quackenboss
Alpheus Sherman
Levi Beardsley
John McKeon
Abraham Cargill
M. Myers
Thos. Herttell
J. Westervelt
Peter S. Titus
Richard Cromwell
N. Nye Hall
Jeromus Johnson
Charles L. Livingston
E. T. Throop
Samuel Swartwout
Hector Craig
D. Banks
W. K. Fuller

James Tallmadge
Thomas J. Oakley
R. Riker
John A. Graham
Peter H. Wendover
H. Meigs
Walter Bowne
Gideon Lee
B. Knower
Abm. Vanwest
Wm. Deitz
Jonathan S. Conklin
M. Vanschaick
John Yates Cebra
Daniel Dusenbury
Jacob Brush
Wm. Van Wyck
Cons. W. Lawrence.

NEW YORK, *September 4, 1833.*

STATE OF NEW YORK, *City of New York, ss:*

I, Henry Meigs, of said city, counsellor at law, formerly a member of the sixteenth Congress of the United States, at present recording secretary of the American Institute, do hereby certify that I have carefully examined the annexed documents relative to the claim of Israel Ketcham against the United States; that I have known said Israel Ketcham for about thirty years, and have very often heard of this claim, which I have no doubt whatever of its perfect truth and justice; that vouchers and papers hereto annexed, marked C, being a copy of William Thomas' affidavit; D, being a copy of John Hogan's affidavit, both sworn before me in 1833, and voucher G, being a declaration of full credit in the integrity of said Israel Ketcham, made in writing in September, 1833, signed by citizens known to our country generally as men of unquestionable truth, is a copy, as I have not a particle of doubt, of the original declaration of which *I the least* was a signer, nor would any one of those signers hesitate, if living, to renew at this distant time their said declaration of confidence in the honor and honesty of the said Israel Ketcham.

H. MEIGS,
*Of the 16th Congress of the United States,
Now Recording Secretary of the American Institute.*

Admitted in evidence.

J. D. McPHERSON,
Deputy Solicitor.

SENATE CHAMBER, *April 12, 1854.*

SIR : The Senate Committee on Claims have under consideration the petition of Israel Ketcham, praying relief for the losses sustained by him, as sub-contractor, in the erection of the fortifications at Dauphin island, for which Farrow & Harris were contractors. In his petition, Mr. Ketcham complains of the misapplication of the sum of \$73,487 78 obtained from the United States by said Farrow & Harris, under the provisions of an act passed for their relief on the 8th of March, 1825, (U. S. Statutes at Large, vol. 6, p. 332.) The petitioner alleges that, on the failure of Farrow to comply with the provisions of said act, he applied to the Secretary of War to prosecute the bond as required by the act, which the Secretary failed to do, thus leaving him (the petitioner) without remedy, Farrow & Harris and their sureties having become insolvent and irresponsible.

The committee desire to be informed whether the files or records of the department contain any evidence of any such application by Mr. Ketcham, or any one else ; and if so, whether the department took any action in the matter ; they also desire to be furnished with any facts in the possession of the department calculated to throw light upon the merits of the case.

I have the honor to be your obedient servant,

S. P. CHASE.

Hon. JEFF. DAVIS, *Secretary of War.*

Copy admitted to be correct.

JOHN D. McPHERSON,
Deputy Solicitor.

WAR DEPARTMENT,
Washington, May 4, 1854.

SIR : In reply to your inquiry of the 12th ultimo, whether Israel Ketcham, or any one else, ever applied to the Secretary of War to prosecute the bond given by Farrow & Harris, contractors for the erection of fortifications on Dauphin island, I have the honor to transmit you a report of the colonel of engineers, stating that there is no evidence on record of any such application having been made, and giving all the information relating to the subject in the possession of the department.

Very respectfully, your obedient servant,

JEFF'N DAVIS,
Secretary of War.

Hon. S. P. CHASE,
Of Committee on Claims, Senate.

ENGINEER DEPARTMENT,
Washington, April 28, 1854.

SIR: In reply to the letter of the Hon. S. P. Chase, of the Senate Committee on Claims, of the 12th instant, referring to the act of the 3d of March, 1825, for the relief of Nimrod Farrow and Richard Harris, and inquiring whether an application was ever made by Israel Ketcham, or any one else, to the Secretary of War to prosecute the bond given by Farrow & Harris, principal contractors in the erection of the fortifications at Dauphin island, and asking to be furnished with any facts in possession of the department calculated to throw light upon the merits of the case, I have the honor to report as follows:

There is no registry of any letter received from Israel Ketcham, nor has this department been able to fall upon any trace leading to letters from other persons making application for the prosecution of the bond in question. It appears, however, from extracts from the records of this office given below, that "the bond has been taken, the money has been paid, and upon an application and satisfactory proof of the failure of Farrow to fulfil the condition of the bond it has been prosecuted; and, moreover, that on the 6th of October, 1826, the War Department determined to take no further steps in the matter until Congress shall decide upon the course to be pursued."

For information on this complicated subject, I beg leave respectfully to refer to the following congressional documents:

Reports of Committees, 2d session, 18th Congress, 1824-'25, vol. 1, Rep. 69; State Papers, 2d session, 20th Congress, 1828-'29, vol. 2, Doc. 21; Executive Documents, 2d session, 23d Congress, 1834-'35, vol. 3, Doc. 78; Reports of Committees, 2d session, 24th Congress, 1836-'37, vol. 2, Rep. 245; Senate Documents, 2d session, 25th Congress, 1837-'38, vol. 4, Doc. 367; Reports of Committees, 3d session, 25th Congress, 1838-'39, vol. 1, Rep. 39; Reports of Committees, 3d session, 27th Congress, 1841-'42, vol. 1, Rep. 50.

I have the honor to be, very respectfully, your most obedient,

JOS. G. TOTTEN.

Brevet Brigadier General, and Colonel of Engineers.

Extract from a letter from General A. Macomb to the Hon. James Barbour, Secretary of War, dated August 28, 1826, reporting upon two communications addressed to the Secretary by Colonel G. C. Russell, as the attorney for Nimrod Farrow, and referring to the act of the 3d of March, 1825, for the relief of Nimrod Farrow and Richard Harris.

"All the requisitions of this section (third section, act 3d March, 1825,) have been fully complied with; the bond has been taken, the money has been paid, and upon an application and satisfactory proof of the failure of Farrow to fulfil the condition of the bond it has been prosecuted."

Copy of a letter from the War Department to Gilbert C. Russell, esq., dated War Department, October 6, 1826.

"SIR: I have received your communication of the present date, desiring an answer to your letters addressed to me last summer on the subject of carrying into effect the act of Congress passed the 3d of March, 1825, entitled an act for the relief of Farrow & Harris.

"In answer to your communication, I have to say to you that, as the subject has been referred to Congress, and as it is now before that body, and as there are so many difficulties connected with it from the variety of conflicting interests which have been presented since the passage of the act, the department is determined to take no further steps in the matter until Congress shall decide upon the course to be pursued."

WAR DEPARTMENT,
Washington, January 29, 1855.

SIR: I have the honor to acknowledge the receipt of your letter of the 23d instant, enclosing the petition, papers, and Senate bill 464, for the relief of Israel Ketcham, and asking for all facts in the possession of this department that will throw additional light upon the claim.

In reply, I transmit you a report of the chief engineer, from which you will perceive that the only information in the department not contained in the papers sent by you is in the report of that officer dated April 28, 1854, which was sent to the Committee on Claims of the Senate, in a letter from this department dated May 4, 1854, copies of which are now enclosed.

All the papers are herewith returned.

Very respectfully, your obedient servant,

JEFFERSON DAVIS,
Secretary of War.

Hon. D. MACE,
Of Committee on Claims, House of Representatives.

ENGINEER DEPARTMENT,
Washington, January 26, 1855.

SIR: I respectfully return herewith the papers in the case of Israel Ketcham, a petitioner to Congress for indemnity for losses sustained by him under a contract with Nimrod Farrow, contractor for the erection of fortifications on Dauphin island, Mobile bay, which, with a letter from the Hon. Daniel Mace, of the Committee on Claims, dated the 23d instant, were referred by you to this office for information.

The only information in this office, in reference to this contract, which is not already embodied in the papers referred, was reported to you in a communication from this office on the 28th of April, 1854.

This report, it appears, was transmitted from the War Department, on the 4th of May, 1854, to the Hon. S. P. Chase, of the Committee on Claims of the Senate, and as it is not found among the papers referred, I have added to them a copy of it, and of your letter with which it was transmitted to Mr. Chase.

I am, very respectfully, your obedient servant,

JOS. G. TOTTEN,
Brevet Brig. Gen., Top. Eng.

Hon. JEFFERSON DAVIS,
Secretary of War.

Circuit Court of the District of Columbia, for the county of Washington.

JAMES BARBOUR, Secretary of War, use of Roland Clapp, vs. GILBERT C. RUSSELL.

December Term, 1828—Action of debt in bond.

I, John A. Smith, clerk of the circuit court of the District of Columbia, for the county of Washington, hereby certify that on the 20th July, 1826, the above suit was instituted, and discontinued at December term, 1828, as appeareth of record.

In testimony whereof, I have hereunto subscribed my name and [L. s.] affixed the seal of said court this 8th January, 1855.

JOHN A. SMITH, *Clerk.*

Circuit Court of the District of Columbia, for the county of Washington.

THE SECRETARY OF WAR, use of Roland Clapp, vs. GILBERT C. RUSSELL.

No. 120 trials—December Term, 1828.

I, John A. Smith, clerk of the circuit court of the District of Columbia, for the county of Washington, do hereby certify that in the above entitled cause is filed a copy of a bond made the 19th day of April, 1825, whereby Nimrod Farrow, George Fisher, Wm. Kelly, L. H. Jones, Gilbert C. Russell, and Jacob Fisher, became bound unto James Barbour, Secretary of War, in the sum of \$120,000, conditioned for the fulfilment by said Farrow of the provisions of the third section of the act of Congress for the relief of Farrow & Harris, approved March 3, 1825, and upon said copy is the following indorsement, to wit:

“Let the suit on the bond be prosecuted according to the directions of the act.

“JAMES BARBOUR.

“WAR DEPARTMENT, *July 20, 1826.*”

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this 5th day of December, 1856.

[L. s]

JNO. A. SMITH, *Clerk.*

Deposition of Israel Ketcham.

[Extracted from Rep. Com. 69, H. R., 2d sess., 18th Cong., p. 61.]

The deposition of Israel Ketcham, of the city of New York, taken at the city of Washington this 12th day of March, 1824, in presence of Thomas Swan, esq., commissioner, &c., to be read in evidence on the claim of Harris & Farrow.

This deponent, being duly sworn, says that he became acquainted with Nimrod Farrow, esq., in the city of New York, on the 1st of September, 1819, where he entered into an agreement with the said Farrow, who was concerned with Richard Harris under a contract with the government of the United States to build extensive fortifications on Dauphin island; that the said Farrow advanced to the deponent the sum of \$5,000, to be used in the purchase of materials, &c., for the use of the works on said island, and that in pursuance thereof he did so lay out the same, and purchased a suitable vessel, and provided it with various materials, implements, &c., and shipped one hundred and sixty laborers and mechanics, and arrived at the island about the 25th of November, 1819; that he found about two hundred laborers judiciously employed in the objects of the contract, and that he remained on the island, or in its vicinity, until the month of May, 1820; and that the contractors had progressed in considerable and costly preparations, when it was agreed between the contractors and General Turner Starke, of Alabama, to substitute black for white labor, the contractors to furnish one hundred efficient negro laborers, and the said Starke as many more; that the said change of black for white labor was in successful operation when deponent left the island, and, in the opinion of this deponent, was a change which would have insured a successful termination of their contract, and would have resulted in a profit to the contractors of at least \$300,000, arising as well from the substitution of black labor as the great and unexpected fall of the price of every kind of labor and material necessary to complete the contract.

Question. How long have you been acquainted with Richard W. Naylor, who is in the employment of Messrs. Farrow & Harris as storekeeper at the public works at Dauphin island?

Answer. I became acquainted with R. W. Naylor from the winter of 1819, and have known him to the present time, and believe him to be a man of industrious habits and good morals, and should place confidence in any statement of his on oath.

ISRAEL KETCHAM.

I have no questions to ask the witness.

THOMAS SWAN.

DISTRICT OF COLUMBIA, *Washington County*:

On this 12th of March, 1824, appeared Israel Ketcham, who made oath in due form of law that the facts set forth in the foregoing affidavit subscribed by him are true, to best of his knowledge and belief.

Given under my hand and seal the day and year above written.

R. C. WEIGHTMAN, [L. s.]

Justice of the Peace.

Extracts from report No. 181, House of Representatives, 20th Congress, 1st session, March 7, 1828.

The Committee on Claims, to whom was referred the petition of Richard Harris and Nimrod Farrow, of the State of Virginia, report:

* * * * *

The petitioners have exhibited an account current claiming for actual expenditures, damages, and losses, a balance of \$78,618 45½. But in this account, under the head of expenditures, some items are charged for which the committee think the United States are not liable. If these be excluded, the aggregate of expenditures, as evidenced by the account, will be about \$313,662, which is more than \$1,800 greater than the amount to which Mr. Naylor testified. This coincidence, though not exact, is yet remarkable, considering the extent and variety of these transactions, and goes to strengthen the confidence which the committee think ought to be reposed in the testimony of Mr. Naylor. This sum of \$311,839, the committee believe, includes the price paid at different times for the slaves purchased for carrying on the work on Dauphin island. No danger is perceived in assuming it as the correct criterion, for the only apprehension which can rest upon the mind of any one is, that the allowance may not be so great as that which the petitioners may be entitled to receive. According to the statement of Colonel Clarke, the amount should be greater by upwards of \$43,000, and it is \$39,618 45½ less than the sum claimed as the balance due the petitioners in the account current. But the coincidence between the account and the statement of Mr. Naylor induces the committee to rely upon his testimony, and to fix the whole amount of expenditures at \$311,839, instead of \$355,000, the statement of Colonel Clarke. * * * *

In the next place, the petitioners charge for the loss of seventeen slaves, detained by the United States and not returned to them. The committee cannot doubt that the slaves, eighty-one in number, were in possession of the United States, and ought to have been returned. The deed of trust to Captain Gadsden, dated April 10, 1820, before referred to by the committee, and the report of the chief engineer to the Secretary of War, dated April 22, 1822, furnish conclusive evidence as to this point.—(See Rep. Com., 2d sess. 18th Con., No. 69.) * * * *

The committee are therefore of the opinion that the United States should pay for the seventeen slaves lost or detained in their possession, and not returned to the owners.

The claim of the petitioners, if decided according to the principles indicated by the committee, will stand as follows:

The United States to Harris & Farrow,

Dr.

To amount of actual expenditures under a contract for erecting a fortification on Dauphin island.....	\$311,839 00
To the value of 17 slaves lost, which were kept from the possession of the contractors under a deed of trust.....	10,200 00
	<u>322,039 00</u>

Cr.

By cash paid at sundry times for work put up and materials furnished.....	\$162,251 37
By 81 slaves, cost \$600.....	48,000 00
By amount of award of commissioner.....	73,747 78
	<u>283,999 15</u>
Leaving this sum due the contractors.....	<u>39,039 85</u>

Decision of the Secretary of War, printed in Doc. 27, House of Representatives, 20th Cong., 2d sess., p. 2.—[370.]

The accounting officers of the treasury will allow under the 4th section of the act of March 3, 1825, for the relief of Farrow & Harris, under conformity with the within report of the Committee on Claims, to John Scott, the attorney of Nimrod Farrow, and trustee under an assignment of Nimrod Farrow, to secure certain sums of money to be paid to John Glassell, Margaret Glassell, and to Joseph Lewis, the amount of two judgments against John Tutt and John Ashley, the sum of two thousand two hundred dollars, being the value of seventeen slaves which were taken possession of by the United States, and which were not returned to the above-named Farrow & Harris.

SAM'L. L. SOUTHARD,
Acting Secretary of War.

DEPARTMENT OF WAR, June 2, 1828.

Extract from memorial of Nimrod Farrow, dated December 17, 1828, printed in Doc. 36, 2d sess., 20th Cong., p. 11.—[370.]

Statement showing the balance due under the 4th section of the act of Congress, passed March 3, 1825, for the relief of Harris & Farrow.

Loss on 50 slaves by reduction on value, whilst they were detained by government (see Lieutenant Ogden's deposition,) \$200 each.....	\$10,000
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Price of 28 slaves who died or ran away during that period, at \$700 each.....	\$19,600
Loss of vessels, boats, horses, &c., supposed worth \$10,000, one moiety.....	5,000
	34,600
By assignment to the United States for balance due Coxé.	15,000
	19,600
Interest on this sum from December 31, 1825, to June 1, 1828.....	2,842
	22,442
Then paid.....	10,200
Due with interest from June 15, 1828.....	12,242

IN THE COURT OF CLAIMS.

ISRAEL KETCHAM *vs.* THE UNITED STATES.

PETITIONER'S BRIEF.

Statement.

In the year 1818 Messrs. Farrow & Harris entered into a contract with the United States for the construction of a fortification at Dauphin island, at Mobile, and in the year 1819 the said Farrow & Harris also entered into a contract with the petitioner to furnish labor and materials for that purpose; and in compliance with said contract he took out from New York a number of mechanics and laborers, with provisions, implements, and materials, to Dauphin island, and expended in the fulfilment of said contract the sum of \$22,528 55, of which sum there has been paid to him only the sum of \$5,000, leaving a balance due and unpaid of \$17,528 55, as will more fully appear by the account.—(Rec., pp. 20, 21.)

To said account the said Farrow, on the 10th day of March, 1824, appended the following acknowledgment, viz:

“Mr. Israel Ketcham has this day presented the within account, and can produce vouchers for the same if it should be required. I do hereby promise to Mr. Israel Ketcham, in the event of the government allowing the claim of Messrs. Farrow & Harris, contractors for the erection of fortifications on Dauphin island, his claim, so far as it is right and just, and I do not know, at the present moment, anything to the contrary; but his claim is justly due to him, which shall be paid to him, or his representatives, in the event of the government leaving it in the power of me to do so.

“Given under my hand this 10th day of March, 1824.

“N. FARROW.”

The erection of said fortification was subsequently abandoned by the government, and several acts were subsequently passed by Congress for the relief of the contractors, the said Farrow & Harris, with a view of indemnifying them for the losses consequent upon the abandonment of the work by the United States ; and on the third day of March, 1825, an act of Congress was passed, by which it was enacted as follows :

“ Be it enacted, &c., That the Secretary of War cause to be withdrawn and dismissed a suit which is now pending by the United States against Nimrod Farrow and his securities, for moneys advanced him by the United States as one of the contractors for erecting a fort on Dauphin island, and that the bond on which the suit was instituted be cancelled.

“ SEC. 2. And be it further enacted, That the Secretary of War cause to be delivered up and released, by proper conveyances, to Nimrod Farrow, contractor for erecting a fort on Dauphin island, all liens or securities which the United States may hold on property, real or personal, of the said contractor.

“ SEC. 3. And be it further enacted, That the proper accounting officers of the Treasury Department pay unto Nimrod Farrow, contractor for erecting a fort on Dauphin island, or to his legal representatives, the sum of seventy-three thousand seven hundred and forty-seven dollars and seventy-eight cents.

“ Provided, That the said Nimrod Farrow, before he shall receive any of the personal property to be delivered as aforesaid, and before he shall be entitled to receive the money above mentioned, shall enter into a bond to the Secretary of War, with security to the acceptance of said Secretary, to the penal sum of \$120,000, conditioned that the said Nimrod Farrow shall appropriate the net proceeds of the personal property and the money to be received towards the payment of the debts contracted by Farrow & Harris, or either of them, or any other person or persons contracting under said Farrow & Harris for supplies furnished and services rendered in and about the erection of said fortification ; and that, if there shall be any surplus after paying the said debts contracted as aforesaid, said Farrow shall pay to said Harris, or his legal representatives or assigns, his just proportion of said surplus, which bond shall be deposited with the Secretary of War, and it shall be the duty of said Secretary, upon the application of any of the parties interested therein, and satisfactory proof of the failure of said Nimrod Farrow to fulfil the conditions thereof, to cause the said bond to be prosecuted for the benefit of the party or parties making such application, and of such other person or persons as may have an interest in said bond.

“ SEC. 4. And be it further enacted, That an inventory be taken of such personal property as shall be returned to the said Farrow under the provisions of this act, and an estimate of its value be made under such regulations as the Secretary of War may prescribe, and that there be paid to said Farrow such difference as exists between the value of the personal property at the time the same was taken possession of by the government and its return, together with the value of the personal property destroyed or lost while the same was in the possession

of the government, except the same was lost or destroyed by the act of God.

“SEC. 5. *And be it further enacted*, That the several sums to be paid by the provisions of this act be paid out of any money in the Treasury not otherwise appropriated.”

A bond was taken by the Secretary of War, in pursuance of the provisions of said act, and Gilbert C. Russell was one of the sureties in said bond, and signed the same upon the express condition that he was to receive the property, or money in lieu thereof, and pay the debts, which amounted to \$112,000; but the Secretary of War dismissed a suit which was then pending against Farrow & Harris on the part of the United States, and paid to the said Farrow & Harris the sum of \$73,000, but absolutely refused to return the property, out of the proceeds of which, and with the said \$73,000, the debts were to be paid; and upon a suit brought by a creditor of said Farrow & Harris, claiming the benefit of said act of Congress against said surety, he was discharged on the ground that said Secretary had failed to execute the provision of said act in relation to said property.

The petitioner, soon after the passage of said act, caused an application to be made on his behalf to the Secretary of War, to institute a suit on said bond against the principal and sureties in the same for his benefit, and at the same time filed with the Secretary the evidence of his claims as a sub-contractor of said Farrow & Harris, but the said Secretary neglected and refused to cause any suit to be instituted on said bond, or to adopt any measure for the application of said money and property towards the payment of the debt of your petitioner.

The petitioner, therefore, claims that the provision of the act of Congress for the payment of the just and acknowledged debt of your petitioner, as a sub-contractor, was defeated by the wrongful act of the Secretary of War, both by his refusal to cause a suit to be instituted on said bond, and by his refusal to transfer said personal property according to the provisions of said act; and that his refusal so to transfer said personal property, in obedience to said act of Congress, deprived the said petitioner of all remedy against the said sureties; and the petitioner has been wholly unable to collect his debt, or any part of the same, from Farrow & Harris, they being wholly insolvent, and no part of the same has since been paid.

The following is an extract from the deposition of Colonel Gilbert A. Russell:

“The act of Congress of 1825 for the relief of Harris & Farrow directed that \$73,000 should be paid to them, and all their property in Alabama, which had been mortgaged or conveyed in trust, estimated at \$120,000, should be returned to them or paid for, unless it had been destroyed or lost by the act of God, never was executed. The act required Harris & Farrow to give bond and security in the sum of \$120,000, that the proceeds of the property, with the \$73,000, should be applied to the payment of any debts contracted by them or their agents for work done or materials delivered, &c., &c. This was done, and I signed the bond on condition that I was to receive the property, or money in lieu thereof, and pay the debts, which amounted to \$112,000. The Secretary of War, in accordance with the requirements of the act, dismissed a suit then pending against Harris &

Farrow, and paid the \$73,000, but absolutely refused to give an order for a return of the property, out of the proceeds of which their debts were to be paid. I was sued by Roland Clapp, who claimed \$6,000, and was held to bail; from the order to hold me to bail, I was discharged, upon the ground that the Secretary of War had failed to execute the provisions of the act; whereupon Clapp dismissed his suit. Had the Secretary complied with this, the most important provision of the act, the just debts of Harris & Farrow would have been paid forthwith. But by the ignorance, or something worse, of the Secretary of War, he positively refused to execute this part of the law, and the debts due for 'work done and materials delivered' were not paid."

I. The testimony in the case shows clearly that the balance which was due the petitioner from Farrow & Harris was \$17,528 55.

II. The act of Congress of the 3d March, 1825, provided for the payment to Nimrod Farrow of \$73,747 78, but that "before he shall receive any of the personal property to be delivered as aforesaid, and before he shall be entitled to receive the money above mentioned, the said Farrow shall enter into a bond to the Secretary of War, with security to the acceptance of said Secretary, in the penal sum \$120,000, conditioned that the said Nimrod Farrow shall appropriate the net proceeds of the personal property, and the money to be received, towards the payment of the debts contracted by Farrow & Harris, or either of them," &c.

It thus appears that the avails of the "personal property," as well as the money, were to be applied to the payment of the sub-contractors, of whom Ketcham was one; and in order to secure this application to the payment of their debts, before signing the bond obligating themselves that the property should be so applied, an express condition was made by Colonel Russell, one of the sureties in the bond, that he "was to receive the property, or money in lieu thereof," but the Secretary of War "absolutely refused to give an order for a return of the property, out of the proceeds of which their debts were to be paid."

If this arrangement had been carried into effect, not only would the sureties have had the means to pay the amount due to Ketcham, and others, but an equitable lien would have existed on the property itself in favor of the sub-contractors, which could have been enforced by the proper legal proceedings.

But the refusal to place the property, in pursuance of the condition, in the hands of the sureties by the Secretary, entirely discharged them from all liability on their bond.

Colonel Russell, one of the sureties thus discharged, expressly swears that "had the Secretary complied with this, the most important provision of the act, the just debts of Harris & Farrow would have been paid forthwith."

III. The act of Congress expressly provided: "And it should be the duty of said Secretary, upon the application of any of the parties interested therein, and satisfactory proof of the failure of said Nimrod Farrow to fulfil the conditions thereof, to cause the said bond to be prosecuted for the benefit of the party or parties making such application, and of such other person or persons as may have an interest in said bond."

It appears, from the certificate of the clerk of the United States cir-

cuit court for the District of Columbia, (Rec., p. 30,) that the Secretary of War ordered "the suit on the bond to be prosecuted according to the directions of the act." The order was by an endorsement on the copy of the bond filed in the clerk's office, and was dated July 20, 1826.

It further appears, by the certificate of the same clerk, that this suit was discontinued at the December term, 1828, by the act of the Secretary of War himself. The suit was solely under his direction, and was prosecuted not only for the benefit of Roland Clapp, but "of such other person or persons as may have an interest in said bond."

Whether this suit was abandoned by the Secretary for the reasons stated by Colonel Russell, or for other reasons, it is clear that it was abandoned, not on account of any act or omission on the part of Clapp or Ketcham, or any other sub-contractor, but on account of the wrongful acts or omissions of the Secretary of War himself.

IV. The pecuniary interests of the parties were expressly intrusted by law to one of the high officers of the government, and the government is clearly responsible for his acts. Congress recognised the obligation of the government for the payment of the debts due to the various parties in interest connected with the transaction, and to see that the property and money should be first applied to the payment of the parties who did the work; but the culpable negligence, at least, of an officer of the government has defeated the just and honest purpose of the act of Congress, and the petitioner has been deprived of the benefit of it.

This is similar to the case where money is by act of Congress directed to be paid to one person, and by mistake or design the money is paid to another. The government in such case always holds itself liable to pay the money again—to the person entitled to it.

From these clear principles of law and justice, sustained by the uniform practice of the government, it is apparent that the petitioner is entitled to relief.

JOHN A. ROCKWELL,
Of Counsel for Petitioner.

IN THE COURT OF CLAIMS.

ISRAEL KETCHAM *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF ON FINAL HEARING.

Claim for moneys which were due the petitioner as a sub-contractor under Nimrod Farrow for the erection of fortifications on Dauphin island, in Mobile bay, and which it is insisted the government is bound to pay, because the Secretary of War did not properly execute an act of Congress.

FACTS AS UNDERSTOOD BY THE SOLICITOR.

1. That Nimrod Farrow was a contractor for the erection of a fortification on Dauphin island, in Mobile bay, about the year 1819.
2. That Richard Harris was, as assignee in part of the contract, or otherwise, interested with said Farrow in its execution.

3. That in 1823 it became a question whether the government or the contractor, or both, had failed in fulfilling this contract, and Congress passed an act (March 3, 1823, 6 U. S. L., 283, 284) for the appointment of suitable persons to examine into this subject, and report; directing suits then pending against Farrow & Harris, and their sureties in Virginia, to be suspended to the end of the next session of Congress.

4. That on the 3d of March, 1825, Congress passed a law for the relief of Farrow & Harris.—(6 U. S. L., 331.)

The first section directed the suit against Farrow, as one of the contractors, and his sureties to be dismissed, and the bond on which it was instituted to be cancelled.

The second, "that the Secretary of War cause to be delivered up and released, by proper conveyances, to Nimrod Farrow, contractor for erecting a fort on Dauphin island, all liens and securities which the United States may hold on property, real or personal, of the said contractor."

The third section provided that \$73,747 78 should be paid to Farrow, out of the treasury, with this proviso:

"*Provided*, That the said Nimrod Farrow, before he shall receive any of the personal property to be delivered as aforesaid, and before he shall be entitled to receive the money above mentioned, he shall enter into a bond to the Secretary of War, with security to the acceptance of the said Secretary, in the penal sum of one hundred and twenty thousand dollars, conditioned that the said Nimrod Farrow shall appropriate the net proceeds of the personal property, and the money so to be received, towards the payment of the debts contracted by Farrow & Harris, or either of them, or any other person or persons contracting under said Farrow & Harris, for supplies furnished and services rendered in and about the erection of said fortifications; and that if there be any surplus after paying the said debts contracted as aforesaid, the said Farrow shall pay to the said Harris, or his legal representatives or assigns, his just proportion of said surplus, which bond shall be deposited with the Secretary of War; and it shall be the duty of the said Secretary, upon the application of any of the parties interested therein, and satisfactory proof of the failure of said Nimrod Farrow to fulfil the condition thereof, to cause the said bond to be prosecuted for the benefit of the party or parties making such application, and of such other person or persons as may have an interest in said bond."

The fourth section provided, "That an inventory be taken of such personal property as shall be returned to the said Farrow under the provisions of this act, and an estimate of its value to be made under such regulations as the Secretary of War may prescribe, and that there be paid to said Farrow such difference as exists between the value of the personal property at the time the same was taken possession of by the government and its return, together with the value of the personal property destroyed or lost while the same was in the possession of the government, except the same was lost or destroyed by the act of God."

5. That on the 14th of July, 1832, Congress passed an act for the

relief of the legal representatives of Nimrod Farrow and Richard Harris, which constituted the Third Auditor, Second Comptroller, and Charles Gratiot, a board to examine the claims of Farrow & Harris growing out of their contract to build said fort, upon principles of justice and equity, and to report to Congress at the next session.—(6 U. S. L., 526.)

6. No evidence has been furnished showing that the government had any liens or securities on the real or personal property of Farrow, or that any release was executed discharging any claim of the government thereto, or what was done on that subject.

7. That before paying to Farrow the \$73,747 78, the Secretary of War took from him a bond and security in the penal sum of \$120,000, in conformity with the proviso of the third section of the act of the 3d of March, 1825.—(Rec., p. 6, claimant's petition.)

8. There is no sufficient and proper evidence that the claimant had a legal demand against Farrow and Harris, or either of them.

The statements by Farrow or Harris concerning the state of the accounts between them and Ketcham is no evidence against the United States. Copies of *ex parte* extra judicial oaths prove nothing whatever.

9. There is no evidence that Ketcham ever applied to the Secretary of War to have Farrow's bond prosecuted, but it is shown that he did not so apply.

General Totten states that "there is no registry of any letter received from Israel Ketcham, nor has this department been able to fall upon any trace leading to letters from other persons making application for the prosecution of the bond in question."—(Rec., p. 27.)

This repels the idea that Ketcham requested the Secretary to prosecute said bond for his benefit, although it fully appears that at the instance of some one the bond was actually prosecuted. From the certificate of John A. Smith, clerk of the circuit court for the District of Columbia, it is probable that it was done at the instance of Rowland Clapp, (Record, pp. 29, 30,) a suit for whose benefit was discontinued.

With a single limited fund, and numerous and large claims, and no special provisions of law regulating the matter, it is probable that the conditions of Farrow's bond could not be enforced, except by some special arrangement among the claimants producing harmony and correct action. Without authority to exercise equity powers to bring in all claimants upon the fund, where there is no statute law to control such a cond, it could not be enforced where there was more than one claimant.

10. There is no proof that Ketcham ever furnished to the Secretary of War "satisfactory proof of the failure of the said Nimrod Farrow to fulfil the conditions" of the bond.

11. There is no evidence concerning the valuation or loss of the personal property, as provided under the 4th section of the act of 1825.

LEGAL PROPOSITIONS.

I. *That the copies of papers now presented are not evidence, because there is no evidence that the originals are destroyed or inaccessible, and none that those presented are true copies of the originals.*

In the claimant's sworn statement, (at pp. 13 and 14 of the Record,) he says that the papers produced are simply copies, and that the originals, or a portion of them, are lost.

a. This statement is too vague and uncertain to enable the court to act upon it. It does not state positively that any paper has been lost or destroyed. No indictment for perjury could be formed upon it. The court cannot say what papers have been lost or destroyed.

b. Although, from necessity, the party's own oath may be taken to prove a loss or destruction of a written instrument, its existence must first be proved by legal evidence. His own oath is never received to prove the latter fact. It would be dangerous to do so, and would lead to endless abuse.

c. The party cannot prove, by his own oath, that the papers he produces are correct copies of lost or destroyed originals. This fact he must prove by other competent evidence, as other facts are proved. If he could be permitted to prove the existence, then the loss, and also the correctness of the copies produced, he would prove his whole case. The fact of his having lost his papers cannot lay the foundation for his proving by his own oath their existence, and that he produces true copies of them.

In this case, there is no pretence that the various depositions produced are originals. If every word in them were untrue, there is no possible means, under the claimant's statement, of convicting those who purport to have sworn to them of perjury. He does not even swear that he compared the copies with the originals. The whole evidence must be rejected as illegal, unless it shall be shown that some of it is really original, which does not appear from the record.

II. *Hearsay evidence proves nothing, even if received.*

This is an elementary principle of almost universal application, and needs neither authority or illustration to secure its practical adoption. Nearly the entire depositions introduced are devoted to stating what is mere hearsay, or matter of opinion, or guess work. If these *ex parte* affidavits were otherwise unobjectionable, they prove little or nothing because of these faults.

Russell swears (Record, pp. 10, 11) that the Secretary of War did not execute a part of the act of 1825. But he could not know this. In this statement he states hearsay, or guesses at the fact.

He states that the Secretary of War refused to give an order for certain property ; but he could not know that he never did so, though there was nothing in the law requiring him to give such order, or perform any act except to execute a release.

He swears to the grounds of Clapp's dismissing his suit ; but he could not know that fact, even if Clapp had said so to him.

He says if the Secretary of War had complied with his duties under the law, the debts due by Farrow & Harris would have been paid. He did not, and could not know that fact. He merely guessed at it.

He says this omission was occasioned by the ignorance of the Secretary of War, or something worse. This he did not, and could not know, except by hearsay. These statements of his are not only not evidence, but are of that character that shows he ought not to be believed, even if his evidence had been legally taken, because he swears positively to what he could not possibly know.

Case's evidence is in every material particular hearsay, or his conclusions from what he knew, and not a statement of facts. It proves nothing that has any bearing upon the questions involved.

Meigs's affidavit is entirely of that character. He states no material or pertinent fact.

The supposed acknowledgment by Farrow (Record p. 21) of copies of vouchers, B, C, D, E, F, and G, is not proved. The statements of those who make affidavits in them prove nothing in a legal way. They are mere hearsay matters. The defendant's own affidavits can establish no fact in his favor. The whole mass of guessing and hearsay evidence must be rejected, and this includes nearly the entire body of papers presented by the claimant as evidence.

III *The depositions offered in evidence are ex parte, and were taken without notice to the United States, and before officers not authorized to administer oaths in cases in this court.*

Ex parte evidence is never admissible in any court, nor can depositions be taken except before persons authorized by law to take the same. The depositions in this case show upon their face that they were taken *ex parte*, and before justices of the peace, who are not authorized to administer oaths in cases in this court. These objections, if they do not apply to all by reason of stipulations, extend to all that are material in establishing the claimant's case, and they must, therefore, be rejected.

IV. *The assumed admission by Farrow of indebtedness by him to Ketcham is no evidence against the United States.*

What he may have said in writing or orally, is, as between Ketcham and the United States, mere hearsay evidence. Although it might be good between Ketcham and Farrow, it establishes no fact between third persons. He might say that, when he did not owe anything. A witness might swear to what Farrow said or wrote, but it would only be testifying to what he heard another say, and would not prove the fact at all. If Farrow's signature were proved to the paper in question, (Record, p. 21,) it would not tend to prove that he owed Ketcham.

V. *The paper produced, if genuine, does not prove how much Farrow owed Ketcham.*

This paper is very special. It does not admit that the account was due, but says it was presented, and Ketcham could produce vouchers for it, and he promises, if Congress allows the claim of Farrow & Harris, to pay, as far as it was right and just, if the government should leave it in his power to pay. This is really no admission or promise to pay. Everything depends upon what does not appear in the paper. It is not shown how much they claimed of Congress, nor that the amount appropriated in 1825 was as large as they demanded. From the subsequent law in 1832, it may be inferred that what they claimed had been allowed only in part.

VI. *The evidence does not show that supplies were furnished or services rendered under a contract with Farrow & Harris, or either of them, or that the claim presented is not within the provisions of the 3d section of the act of 1825, providing the condition of the bond to be given by Farrow.*

The act provides that the bond shall be conditioned that Farrow "shall appropriate the net proceeds of the personal property and the money to be received towards the payment of the debts contracted by Farrow & Harris, or either of them, or any other person or persons contracting under the said Farrow & Harris, for supplies furnished and services rendered in and about the erection of said fortification."

The act is limited to two objects—supplies furnished in constructing the fort and labor performed in its erection. Ordinarily, the word "supplies" means "grants of money by parliament to supply the exigencies of the government."—(See Bouvier, Jacob, and Tomlinson.) In the present instance it is synonymous with the word "materials," Congress intending to force Farrow to pay for the materials furnished for the fort and the labor bestowed upon it.

In the present case Ketcham states that he was a contractor to supply brick wanted for the construction of the fort, and he sets out a contract to that effect. If his claim was for brick thus furnished, or labor upon the fort, his claim might be included within the provisions of the condition required. But he makes no claim for brick furnished or labor performed on the fort. The claim presented is mostly for goods, wares, and merchandise, and not for materials furnished for the fort, nor for personal labor. Not an item is within his contract which he has set out, and under which he claims as a sub-contractor. A few items will show the character of his account against Farrow:

194 pairs of men's shoes, at \$1 50.....	\$291 00
2 boxes for same, at \$1.....	2 00
2 sets of harness, at \$15.....	30 00
1 anchor, 6 cwt., at 10 cents per pound.....	160 00
500 lbs. oakum, at 15 cents.....	75 00
57 cwt. 1 qr. 16 lbs. cordage at 12 cents.....	753 76

1 8 inch cable, 12 cwt. 0 qr. 0 lb., at 8 cents.....	107 52
15 fathoms 13-inch cable, 7 cwt. 2 qrs. 0 lb., at 9 cents..	67 29
2 kegs twist tobacco, 288 lbs., at 40 cents.....	115 20
1 keg hard, 135 lbs., at 30 cents.....	39 90
1 bbl. roll tobacco, 168 lbs., at 30 cents.....	58 80
Ship Orris, at \$1,600.....	1,600 00
For repairing, agreed to be paid on her.....	348 75
For 160 passengers from New York to Mobile, at \$30....	4,800 00
Wages for 100 men two months, average \$30 each.....	6,000 00
Board for the same, \$12 each, two months.....	2,400 00
Compensation for my own services.....	3,000 00
Discount on \$5,000 received.....	75 00
Expenses for going to Virginia after the same.....	80 00
1 dozen fancy chairs, delivered at Red Bluff, at \$3 50.....	42 00
Cash paid Seth Belknap.....	300 00
	20,346 22

None of these charges are within the contract, and none are for things shown to have been materials for or labor on the fort. There is no evidence that Ketcham paid the wages of 100 men, working on the fort for two months. No part of this whole account comes within the provisions of the act. It therefore follows that the case, as proved, does not entitle him to what he claims, if there were no other objections to it. The claimant was not entitled to demand that a suit should be instituted by the Secretary of War upon the bond. No suit could have been sustained, and the institution of one would have been worse than useless. Not being provided for in the act, and entitled to have a suit instituted, he can recover nothing here.

VII. *Ketcham not having required the Secretary of War to institute a suit upon Farrow's bond, he has no cause of complaint for the non-performance of any duty required by law.*

The rights of the claimant, if any he has, grow out of a statute, and that must be strictly pursued to entitle him to anything under it. The provision of this part of the act is, "and it shall be the duty of the Secretary, upon the application of any of the parties interested therein, and upon satisfactory proof of the failure of the said Nimrod Farrow to fulfil the conditions thereof, to cause the said bond to be prosecuted for the benefit of the party or parties making such application, and of such other person or persons as may have an interest in said bond."

There is no evidence that the claimant ever made application to the Secretary, with any evidence of his rights, requesting him to prosecute said bond. He has omitted all proof of the facts which form the condition upon which the Secretary was authorized to act. Without such application and satisfactory proof of Farrow's failure to perform the conditions of his bond, the Secretary would have been guilty of an offence to have caused a prosecution of the bond, and, on proof of the

fact, any suit instituted would have been defeated, because of his want of authority to sue. This is a fatal defect in the claimant's case, and must defeat his claim.

VIII. *If Ketcham called upon the Secretary to institute a suit upon Farrow's bond, if no proof of his claim was presented, the Secretary could not order a suit, and if proof was presented, it rested with the Secretary to decide whether it was satisfactory, and his decision thereon was final and conclusive.*

The Secretary was authorized to sue when the claimant performed certain conditions. *First*, he must make application to the Secretary. *Second*, he must show that he had an interest in the condition of the bond. *Third*, he must show to the Secretary, by proof satisfactory to him, that Farrow had failed to fulfil the conditions of his bond.

From necessity, it devolved upon the Secretary to determine these questions. No one else could do so, and hence his determination, whether mistaken or not, was final and conclusive, and is not the subject of review here or elsewhere. It is true, if he acted fraudulently, the claimant might have an action against the Secretary for his damages. In such a case the question would be one of fraud or good faith. But in every other category the decision of the Secretary would be final and conclusive. If Ketcham in fact did present his request and evidence, and the Secretary refused to act, it is clear that it must have been because he did not make out a case entitling him to require a suit to be brought.

The question of satisfactory proof of the failure of Farrow to perform the condition of his bond involved the consideration whether Ketcham's claim came within the provisions of the act, as being for supplies and labor for the construction of the fort. He necessarily determined this question among others, and his adjudication is conclusive. This court cannot go into the questions before him for the purpose of correcting errors, if any, committed by him when Congress conferred upon him the power of deciding, and if he did do so, that closes the matter. If the claimant did not present his proofs, then the Secretary fell into no error. In either event the present claim cannot be maintained.

IX. *If this case is brought to recover for a misfeasance or non-feasance of the Secretary of War, in the discharge of his official duties, it will not lie, because the government is not responsible for such misfeasance or non-feasance.*

If the Secretary performed his duty in a wrongful, fraudulent, or malicious manner, or fraudulently or maliciously refused to perform his duty, it might subject him to liability to the party injured, but could not subject the government to damages therefor. The latter is liable for his legal, and not for illegal acts. No recovery can be had in this case, because the wrong, if any, was one not authorized by the government, but the liability, if any, rests upon him who did the wrong.

X. *This court has no jurisdiction over this case as presented, because the damages, if any were sustained, result from the non-feasance of a public officer, is not within the class of cases that the statute authorizes this court to hear and determine.*

The sole ground of complaint in this case seems to be, that the Secretary of War omitted to perform a duty enjoined upon him by law, and that in consequence thereof the claimant failed to collect a debt. It follows, that it does not come within the provisions of the statute organizing this court, which limits its jurisdiction to cases where rights are claimed under a statute, a regulation of a department, or a contract, expressed or implied.

R. H. GILLET, *Solicitor.*

AUGUST 21, 1858.

IN THE COURT OF CLAIMS.

July 18, 1859.

ISRAEL KETCHAM *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the court.

This case was referred to this court by a resolution of the House of Representatives of March 3, 1855.

The petition alleges that Messrs. Farrow & Harris entered into a contract in 1818 with the United States to construct a fort on Dauphin island, Mobile bay; that in 1819 they, Farrow & Harris, made a contract with the claimant by which the latter was to furnish to the former labor and materials towards the building of said fort; that labor and materials were accordingly furnished by the claimant to said contractors, under his contract, to the amount of \$22,528 55, of which sum \$5,000 were paid to him, leaving a balance of \$17,528 55 due to him from the said contractors.

The petition further states that the erection of said fort was subsequently abandoned by the government; that in 1825 an act of Congress was passed for the benefit of said Farrow & Harris in the premises, and of the persons contracting under said Farrow & Harris for supplies and services in and about the erecting of the said fort; that by that act certain duties, which will be hereinafter stated, were prescribed to the Secretary of War relative to the matters embraced in it, which duties he failed to perform; and that in consequence of such failure the claimant has been unable to collect his debt from said Farrow & Harris, who are insolvent.

The first point to be ascertained is, whether Farrow & Harris, or either of them, were indebted to the claimant as he alleges.

We are satisfied from the evidence that Farrow & Harris, or one of them, were indebted to the claimant, but as to the particular amount of the debt we are not informed. To show that the sum claimed by

the petition was due from Farrow, the claimant produces a copy of an account of various items, which, after deducting a credit of \$5,000, leaves a balance of \$17,528 55. At the foot of that account there is a writing rather singular in form, which is alleged to be an acknowledgment of said balance being due, and which purports to be signed by Nimrod Farrow. There is an affidavit of the claimant stating that the originals of said account and writing annexed are lost, and that the copies of both are correct. This affidavit of the claimant is admissible to show the loss of the originals but not to prove the correctness of the copies or the execution of the writing annexed to the account. This alleged copy of said acknowledgment not being proved to be a true copy, and the execution of the original not being proved, is not admissible evidence, and the account of items is not proved by it. Again, to prove said balance of \$17,528 55 to be due, a copy of a paper having the name "William Thomas" at the bottom is offered in evidence. This copy has also, below the said name, the following words: "Sworn to before H. Meigs, December 9, 1833." In order to make this copy evidence, a paper respecting it, purporting to be signed "H. Meigs, of the 16th Congress of the U. S., now Rec. Sec. of the Am. Inst.," which is admitted as evidence by the deputy solicitor, is introduced; but as H. Meigs is not named in the jurat as an officer of any kind, and merely calls himself in the subsequent paper recording secretary as aforesaid, the paper having the name "William Thomas" attached to it cannot be received as evidence. So that, though we think that there is some amount due from Farrow & Harris, or from one of them, to the claimant, yet we are not furnished with the means of determining how much is due.

But supposing that a certain sum is shown to be due to the claimant from Farrow & Harris, or from one of them, we are then to examine whether the United States, on account of any default of the Secretary of War, are liable to pay for it.

It appears that in July, 1818, Richard Harris contracted with the United States to erect a fort on Dauphin island, at the entrance of Mobile bay; that in November of the same year Nimrod Farrow became jointly concerned with Harris in the contract; that in 1819, Israel Ketcham, the present claimant, resident in New York, in conformity to an agreement between him and Farrow & Harris, employed a large number of workmen and transported them, with provisions, materials, &c., purchased by him, to Dauphin island aforesaid, to aid in the construction of said fort—Farrow & Harris having advanced to him \$5,000 on his contract; that in 1821, Congress, having previously appropriated large sums of money for the building of said fort, and after much work had been done on it, refused to make any further appropriations on the subject, and the building of the fort was consequently abandoned; that the government, soon after such abandonment, sued Farrow & Harris for a balance alleged to be due from them on the accounts relative to the work they had done on the building and the money advanced to them by the government; that whilst such suit was pending—to wit, on the 3d of March, 1823—an act of Congress was passed authorizing the Secretary of War, by some suitable person or persons, to ascertain the facts relative to the

building of said fort, &c.; that the Secretary thereupon appointed Mr. Swann, of Alexandria, to attend to the business, who made a report very favorable to Farrow & Harris, the contractors; that soon after this report was made—to wit, on the 3d of March, 1825—Congress passed the following act on the subject:

“*Be it enacted, &c.*, That the Secretary of War cause to be withdrawn and dismissed a suit which is now pending by the United States against Nimrod Farrow and his securities for money advanced him by the United States as one of the contractors for erecting a fort on Dauphin island; and that the bond on which the suit was instituted be cancelled.

“SEC. 2. That the Secretary of War cause to be delivered up and released, by proper conveyances, to Nimrod Farrow, contractor for erecting a fort on Dauphin island, all liens or securities which the United States may hold on property, real or personal, of the said contractor.

“SEC. 3. That the proper accounting officers of the Treasury Department pay unto Nimrod Farrow, contractor for erecting a fort on Dauphin island, or to his legal representatives, the sum of seventy-three thousand seven hundred and forty-seven dollars and seventy-eight cents: *Provided*, That the said Nimrod Farrow, before he shall receive any of the personal property to be delivered as aforesaid, and before he shall be entitled to receive the money above mentioned, shall enter into a bond to the Secretary of War, with security to the acceptance of said Secretary, in the penal sum of one hundred and twenty thousand dollars, conditioned that the said Nimrod Farrow shall appropriate the net proceeds of the personal property and the money so to be received towards the payment of the debts contracted by Farrow & Harris, or either of them, or any other person or persons contracting under said Farrow & Harris, for supplies furnished and services rendered in and about the erection of said fortification; * * * which bond shall be deposited with the Secretary of War; and it shall be the duty of the said Secretary, upon the application of any of the parties interested therein, and satisfactory proof of the failure of the said Nimrod Farrow to fulfil the condition thereof, to cause the said bond to be prosecuted for the benefit of the party or parties making such application, and of such other person or persons as may have an interest in said bond.

“SEC. 4. That an inventory be taken of such personal property as shall be returned to the said Farrow under the provisions of this act, and an estimate of its value be made under such regulations as the Secretary of War may prescribe; and that there be paid unto the said Farrow such difference as exists between the value of the personal property at the time the same was taken possession of by the government and its return, together with the value of the personal property destroyed or lost while the same was in possession of the government, except the same was lost or destroyed by the act of God.

“SEC. 5. That the several sums to be paid by the provisions of this act be paid out of any money in the treasury not otherwise appropriated.”—(6 Stat. L., 331.)

The claimant, in his petition and in his brief, alleges that the

Secretary of War failed to discharge his duty, under said act of 1825, in two particulars, to the claimant's prejudice. The first of these alleged breaches of duty is, that the Secretary refused to deliver to the claimant the personal property mentioned in the said act. The only evidence relied on to sustain this allegation is an *ex parte* affidavit of Gilbert C. Russell. That affiant states that "the Secretary of War, in accordance with the requirements of the act, (of 1825,) dismissed a suit then pending against Harris & Farrow and paid the \$73,000, but absolutely refused to give an order for a return of the property, out of the proceeds of which their debts were to be paid." There is no doubt but that the Secretary did not deliver the property in question to Farrow; but there is a good reason for his not doing so, which reason is, that the property alluded to was not nor ever had been in the possession of the United States. This fact is shown by the following communications:

"ENGINEER DEPARTMENT, *May 2, 1825.*

"SIR: In pursuance of your directions to state such information as may be possessed by this department respecting the property referred to in the fourth section of the act of Congress, approved on the 3d of March last, 'for the relief of Nimrod Farrow and Richard Harris,' I have the honor to make the following report, in which, to explain the true relation in which the government stands to that property, it will be necessary to detail the circumstances which produced that relation:

"Messrs. Farrow & Harris were the joint owners of the contract for erecting a fort on Dauphin island, the former having become possessed of one-half of that contract by purchase from the latter, who was the original sole contractor. On the 10th of April, 1820, an agreement was entered into between them and General Turner Starke, by which was conveyed to the latter the right of property in one-half, and the exclusive possession, management, and control of the whole of the contract until it should be completed. One of the conditions upon which General Starke consented to become interested in the contract was, that such a disposition should be made of the property then appertaining to it as would prevent its being alienated or diverted from its appropriate uses. To this end it was proposed that it should be conveyed to the government as collateral security for advances which had been granted to facilitate the prosecution of the contract, with the understanding that it should be retained in possession by General Starke, and applied to the fulfilment of the contract. Accordingly, on the 10th of April, 1820, the same day on which the agreement adverted to was entered into, Messrs. Farrow & Harris executed a deed of trust to Captain Gadsden, as the agent of the government, conveying to him the property in question, which was particularly set forth and described in the schedule annexed to it. General Starke was recognized by the government as the agent of Farrow & Harris with a view of his having the sole management of the contract, in pursuance of the arrangement just stated. It is believed the contractors put him in possession of all the property connected with the contract, and that Captain Gadsden, although it was conveyed in

trust to him as the agent of the government, never had actual possession of it, and never was intended to have it, as has been explained. Captain Gadsden transmitted to this department a copy of the deed of trust, but not of the schedule of the property which was annexed to it, except that portion of it which consisted of slaves. A transcript (of that copy) is enclosed herewith. It will be perceived that it contains only a general recapitulation of the property. The original deed was turned over by Captain Gadsden to Captain De Russy, on being relieved by him in the superintendence of the fortifications on the Gulf of Mexico.

"The property, it is presumed, is at this time in the possession of the representatives of General Starke, who has been dead for some time. The negroes were removed, it is believed, to the plantation of General Starke, in Alabama, shortly after the suspension of the operations of the contract, produced by the refusal of Congress to appropriate money for carrying them on, and were to be kept there until the ultimate decision of Congress should be known. That decision was adverse to the contractors, and suits were brought against them and their securities; and, consequently, the further agency of this department in the transactions of the contract ceased.

"Respectfully submitted,

"ALEX. MACOMB,

"Major General and Chief Engineer.

"Hon. JAMES BARBOUR,

"Secretary of War."

(5 vol. Ex. Papers, 19 Cong., 1st sess., H. R., No. 104.)

Mr. Burch, assistant quartermaster, who, on the 2d of May, 1825, was appointed by the Secretary of War to examine into and report the facts relative to said property, made his report on the 31st of December, 1825. The following is an extract from that report:

"It appears from the testimony of Colonel Gadsden and Major De Russey, supported by the deed of trust itself and the agreement entered into between Farrow & Harris, and Turner Starke, on the 10th day of April, 1820, that the property was never in the possession of the United States; but that the deed of trust was intended to have effect solely for the advantage of the contractors, leaving the property at the disposal of themselves and of Starke, their legally authorized agent for carrying on the work and constructing the fortification. The testimony of J. F. Ross states that the slaves came into his possession, as the administrator on Starke's estate, after his decease, and are still in his possession. Moreover, the agreement between Farrow & Harris, and Starke, of the 10th of April, 1820, and the deed of conveyance executed on the 1st day of August, 1820, (182?) show conclusively that Farrow & Harris had ceased altogether to be owners of any part of the property, which it was contemplated, by the law of the 3d March last, should be returnable to them, long previous to the passage of that law."—(5 vol. Ex. Papers, supra, No. 104.)

The above documents show that said property was never in the possession of the United States. There was a deed of trust for it to Captain Gadsden, as an agent of the United States, dated April 10,

1820, but the contractors and their agent kept possession of the property and used it in the same manner after the execution of the deed as they had done before. Whatever lien on the property in favor of the government may have been created by the deed of trust was released. Such release of the lien is admitted by Farrow in two different parts of his memorial to the Secretary of War of December 17, 1828.—(2 vol. Ex. Papers, 20th Cong. 2d sess., No. 36, pp. 5, 6.) The present claim, therefore, so far as it is founded on the breach of duty of the Secretary of War in not delivering said property to Farrow, is without foundation.

The second breach of duty alleged to have been committed by the Secretary of War to the claimant's prejudice is, that he failed to sue on the bond given under said act of 1825 by Farrow and his sureties. The 3d section of that act makes it the duty of the Secretary of War, on the application of any of the parties interested in the bond, and satisfactory proof of the failure of Farrow to fulfil the condition thereof, to cause the same to be prosecuted. The allegation on this subject in the petition is, that soon after said act of 1825 passed, the claimant caused an application to be made on his behalf to the Secretary of War to institute a suit on said bond against the principal and sureties in the same for his benefit, and at the same time filed with the Secretary the evidence of his claim as a sub-contractor of Farrow & Harris; but the Secretary neglected and refused to sue on the bond, &c. The only evidence relied on to prove this alleged application is an *ex parte* affidavit of Walter Case, made in 1851, which states that the affiant "knows that the Hon. Parmenio Adams, a member of Congress, acted as agent for said Israel Ketcham after said act of 1825 was passed, providing for the pay of sub-contractors as aforesaid under the said Farrow & Harris, because the said Parmenio wrote to this deponent at Newburg from Washington, in the absence of the said Ketcham, saying that he had applied to Mr. Barbour, the Secretary of War, in behalf of said Ketcham, to have suits brought against the said Nimrod Farrow and his sureties in behalf of the sub-contractors aforesaid, and that Mr. Barbour assured him that Ketcham should be paid." Now that is mere hearsay evidence, and is inadmissible. Mr. Adams, who was not under oath, informed the affiant so and so. No court of law or equity ever admits such evidence. But the mere application relied on, had it been proved, would not have answered the act of Congress. It was necessary to go further, and satisfy the Secretary that Ketcham was interested in the bond, on account of services rendered or supplies furnished, as mentioned in said act. It does not appear that the claimant, or any person for him, had satisfied the Secretary on that subject. There is evidence, to be sure, that on the 20th of July, 1826, the Secretary sued on the bond in the circuit court of the District of Columbia; the suit being entitled, "The Secretary of War, use of Roland Clapp, *vs.* Gilbert C. Russell." That suit was discontinued in December, 1828, and the defendant, Russell, in his affidavit introduced as evidence by the present claimant, says that said Roland Clapp discontinued it. These facts show no default on the part of

the Secretary, relative to the bond, of which the claimant can complain.

Our opinion is, for the reasons above given, that the claimant is not, according to law or the principles of justice and equity, entitled to recover in this case.

House documents

Bd.: [129,2.] 1859/60 (1860) = Congress 36, Sess. 1

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Am.b. 3040-129,2

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